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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner*,

v.

UNITED ARTISTS TELEVISION, INC., *Respondent*.

On Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (A 1343-67)[1] is reported at 377 F. 2d 872. The opinion of the district court (A 19-107) is reported at 255 F. Supp. 177.

JURISDICTION

The judgment of the court of appeals (A 1368) was entered on May 22, 1967. An application for extension of time to file a petition for writ of certiorari was

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[1] "A" refers to the printed Appendix filed in this Court under Rule 36.1; "E" to the printed Exhibit volume of the Appendix filed in this Court. References to the original record are indicated by "R."

granted by this Court on July 21, 1967, extending such time until September 15, 1967, and a petition was filed on September 15, 1967. The petition was granted by this Court on December 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the activity of a community antenna television system (CATV) in receiving off the air and instantaneously transmitting through wires the electromagnetic waves broadcast by a television station, without producing or handling the visual image or sound of television programs anywhere in the system, constitutes, within the meaning of §§ 1(c) and 1(d) of the Copyright Act, a "performance" of motion pictures broadcast by that station under license from the copyright owner, and whether any such "performance" is "in public" within the meaning of the Act, so that the operation of such a system constitutes infringement of the copyright on such motion pictures.

2. Whether the decision that the statutory copyright monopoly should be judicially applied to hold CATV systems liable for infringement is a construction of the performance right contrary to policies of the Copyright Act and the Communications Act and is such an inflexible judicial rule erroneous when it would also be inconsistent with the F.C.C.'s regulatory scheme for CATV and in conflict with one of the key elements of that scheme.

3. Whether, when a copyright owner has authorized a television station to broadcast a copyrighted motion picture, a homeowner's right to receive and enjoy that broadcast on his own television set through a receiving antenna or antenna service of his choice, such as that

provided by petitioner's CATV system, is protected by a license implied in law under the Copyright Act and/or the Communications Act.

4. Whether a CATV system such as petitioner's, located within the Grade B contour (the normal predicted service area as determined under regulations of the Federal Communications Commission) of the broadcasting station whose signals it is receiving, has a license implied in law to receive such signals and transmit them to its subscribers for viewing on their own television sets without copyright infringement liability.

STATUTES AND REGULATIONS INVOLVED

Sections 1(c) and 1(d) of the Copyright Act, *as amended* (17 U.S.C. §§ 1(c), (d) (1964)); Sections 3(o), 303(c), (d) and (h), 307 (b) and 325(a) of the Communications Act of 1934, *as amended* (47 U.S.C. §§ 151, 153(o), 303(c), (d) and (h), 307(b), and 325(a) (1964)); and §§ 74.1033 and 74.1103 of the regulations promulgated by the Federal Communications Commission, *as amended* (47 C.F.R. §§ 74.1033, 74.1103); are set forth in the Appendix to this brief (pp. 103-9, *infra*).

STATEMENT[2]

A. Proceedings Below

Defendant Fortnightly Corporation (petitioner here) owned and operated two community antenna television

[2] As the court of appeals stated, "the facts concerning the operations of defendant's CATV systems are essentially undisputed, and the issue is whether, as a matter of law, defendant publicly performs telecast copyrighted motion pictures. Our review . . . is therefore not circumscribed by the 'clearly erroneous' standard. . . ." A 1346; 377 F. 2d at 874, n. 2.

systems in and around the towns of Clarksburg and Fairmont, West Virginia. Plaintiff United Artists Television, Inc. (respondent here) claims copyright in approximately 750 motion pictures and 600 cartoons which it authorized for public broadcast over five television stations—three located in Pittsburgh, Pennsylvania, and one each in Wheeling, West Virginia, and Steubenville, Ohio. Petitioner's systems in Clarksburg and Fairmont received the signals of these stations off the air (without the aid of microwave or other types of relay stations)[3] and transmitted them to the homes of the systems' subscribers so that the subscribers might view the programs on their own television sets.[4] Respondent brought this action seeking damages and an injunction on the ground that the operation of petitioner's systems constituted a "performance . . . in public" of the copyrighted motion pictures, within the meaning of §§ 1(c) and 1(d) of the Copyright Act. Each reception of each of the thousands of broadcasts

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[3] A microwave relay station is a radio transmitter which transmits radio (television) signals from one point to another in a narrow beam or straight line. The F.C.C. licenses the use of these stations singly or in a series to relay television broadcast signals over long distances. Microwave relays are used by, among others, common carriers such as American Telephone and Telegraph Company, television stations, and the national networks. A minority of CATV systems use some microwave where the CATV is well beyond the normal service area of the particular station; however, such use is subject to strict F.C.C. licensing regulations. 47 C.F.R. §§ 21.710-.714, 74.1001-.1083, 91.557-.561 (1967), *as amended*, 32 Fed. Reg. 914 (1967).

Public records of the F.C.C. show that out of 2246 CATV systems responding to a recent F.C.C. questionnaire, over 70% receive *all* signals off the air, that is, without any use of microwave. See CATV Operational and Ownership Data—1966, F.C.C. Release No. 6605, Public Notice-G, Nov. 22, 1967, chart 9.

[4] Petitioner did not sell, lease, or service the television sets. A214.

of the movies and cartoons was alleged to be a separate infringement giving rise to the statutory minimum damages of $250 under § 101(b) of the Act.

Pursuant to a pre-trial order, the issue of whether the operations of petitioner's systems constituted such a "public performance" of the motion pictures, and the issue of whether these operations in aiding reception by members of the public of broadcasts licensed by the copyright owner were in any event protected from the copyright-infringement liability by a license implied in law, were tried separately from unrelated issues.[5] Formal assumptions were made that respondent owned valid copyrights in certain motion pictures, that these motion pictures were telecast by the television stations in Pittsburgh, Wheeling, and Steubenville, and that the signals of these stations were received by petitioner's two CATV systems and made available to the systems' subscribers. It was further assumed that the telecasts with respect to which petitioner was alleged to have infringed had been duly licensed and authorized by respondent through license contracts with the television stations. A 188.[6]

Respondent stipulated that the broadcasting stations were not guilty of copyright infringement by reason of the telecasts in question; respondent also stipulated that it did not contend that any of the homeowners who viewed the programs through subscribing to petitioner's systems were guilty of copyright infringement. A 27-28, 809, 817. No contention was made that respondent or anyone else owned a copyright in the elec-

[5] Pre-trial Orders Nos. 1 and 2; A 174 and 182.

[6] No assumption was made, and there was no evidence, that any of the broadcasts of respondent's movies or cartoons were actually seen or heard by any subscribers.

tromagnetic waves received and transmitted to the subscribers. R 5459.

After trial, the district court issued an opinion and order dated May 23, 1966, holding that petitioner's CATV systems infringed respondent's copyrights by publicly performing the copyrighted motion pictures, and that these public performances were not licensed as a matter of law. A 19-107, 255 F. Supp. 177 (S.D.N.Y. 1966). On interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the court of appeals affirmed in an opinion dated May 22, 1967. A 1343-67, 377 F. 2d 872 (2d Cir. 1967). The opinions of the two courts are discussed at pp. 16-20 *infra*.

B. The Function of a Receiving Antenna in Television Broadcasting

A television station is licensed to use the publicly-owned spectrum to broadcast, but has no obligation to assure reception in the station's service area; it is up to members of the public to provide their own means of reception. To much of the American public, television requires merely the purchase of a receiving set. In order to function, however, every television set must have a receiving antenna and a connection from the antenna to the set. The antenna which is built into every television set may be sufficient for reception of nearby stations. In other instances or in less advantageous locations, so-called "rabbit ears" antennas resting on the top of the television receiver are necessary for adequate reception. Where the stations are at greater distances, or the receiving location is disadvantageously situated behind a hill or other blocking terrain or among buildings, it may be necessary (and it is common) to use a better antenna and to place the antenna on a pole or rooftop, with a longer wire or

cable connecting the antenna to the set. Sometimes an amplifier becomes necessary and may be mounted on the antenna mast to amplify the signal transmitted to the set and thereby improve reception.

An individual member of the public can improve the quality of his television reception by installing a larger or more sentitive antenna, or by placing it at a higher and more advantageous location. The basic limiting factors are the amount of money he wishes to spend on his antenna installation and the quality of reception he will accept. More elaborate antenna installations and cooperative systems are common in suburbs and rural areas. Master antennas for a single building such as an apartment house, or for a group of buildings, are common in metropolitan areas. CATV systems such as petitioner's perform the same function as the homeowner's antenna and the connecting line to his set (A 641-43), the principal difference being that the master antenna and connecting line are made available by an entrepreneur to a number of set owners for a fee.[7]

The towns of Clarksburg and Fairmont are located about 18 miles apart in north-central West Virginia. Fairmont is about 67 miles from Pittsburgh, 52 miles from Wheeling, and 65 miles from Steubenville; Clarksburg is about 82 miles from Pittsburgh, 57 miles from Wheeling, and 74 miles from Steubenville. A 32. The terrain surrounding the two towns (and the terrain within Fairmont itself) is hilly, and most of the residences in the two towns are located in valleys. For these reasons, television reception there has not been easy. A 33 (district court opinion), 910-13, 1171. Ac-

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[7] Statistics released by the F.C.C. show that 1623 CATV systems out of a total of 2162 systems reporting are in towns with a population of less than 10,000. CATV Operational and Ownership Data—1966, supra note 3, Chart 2.

cordingly, since the early 1950's many residents of the two communities have utilized CATV systems, including the petitioner's and others, and there are a number of cooperative antenna systems as well in and around these communities. A 277-78, 1198-1200, 1239, 1285-86. However, there is evidence in the record that some residents of the two towns did use their own antennas (A 272-77, 907-10, 1197-98, 1230-32) and could receive some or all of the Pittsburgh, Wheeling, and Steubenville stations with such antennas, A 910-13, 1161-77; Ex. M2, E 413, R 2406-08.[8]

C. Petitioner's CATV Systems and Their Operation

Petitioner's system in Clarksburg and Fairmont were started in 1952. They received the broadcast signals off the air, without microwave or other type of relay. The court of appeals provided the following short description of the systems (A 1346-47):

> "Both the Clarksburg and the Fairmont CATV systems receive broadcast television signals by means of tall antennas on hilltops some two and a half and one and a half miles respectively from the city centers, and transmit them through coaxial cables strung along utility poles and smaller 'house drop' cables to television sets on subscribers' premises. The television signals of each station carried by a system are received by a separate antenna specifically designed and oriented to receive them.[9] The signals of all the stations car-

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[8] See discussion at note 111 *infra*.

[9] The receiving antennas used by the systems were of a common variety available in radio stores and widely used by the public. A 208-09, 524-25, 880-81 (testimony of both parties' experts). An antenna is "oriented" by pointing it toward the signal source, thus increasing the sensitivity or "gain" of the antenna. A 524-25.

ried by the system are then transmitted together over its cables, without any editing or selection of programs, and the system has no way of knowing which program, if any, a subscriber has turned on. Both CATV systems carried three stations from their inception in 1952 to 1958, and five thereafter. Although there are local television broadcasting stations in Clarksburg and Weston, West Virginia, the CATV offerings attracted substantial numbers of subscribers to both systems.[10] At the end of 1963, the Clarksburg system had 9571 subscribers and the Fairmont system 6047. The number of subscribers of each system in 1960 was over half the number of occupied housing units counted by the United States Census of Housing in the area they served.

"Defendant, like its predecessors, is a private corporation operating the CATV systems for profit under municipal franchises. Each subscriber pays an initial charge, which is reduced if his premises are already connected to the CATV system, and fixed monthly charges.[11] Additional charges are made for connecting additional sets. Different charges, sometimes individually negotiated, have at

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[10] Within the period covered by this action, the two "local" stations were carried by petitioner's CATV systems in lieu of the stations involved in this case. WBOY, located in Clarksburg, was carried by the Clarksburg system beginning in 1962, and WJPB, located in Weston (about 15 miles from Clarksburg), was carried by both systems from March, 1964. A 39 (district court opinion), 207.

[11] The contract between petitioner and its subscribers obliged petitioner "to extend its Community Antenna System . . . to make available television signals to the Subscriber at the following premises . . . ." Exs. 47, 51 and Q2, E 168, E 176, E 417, A 587, 592, 1258-61. The contract related only to such television "signals," and the charges under the contract were unrelated to programs viewed by the subscriber or to the subscriber's use of his television set. See para. II-2.1 of Stip. No. 2, A 218.

times been established for hotels, motels, and other nonresidential subscribers. Both the Clarksburg and the Fairmont systems often advertised the variety of stations and programming they made available, at times in connection with particular program. Both systems conducted mail ballots among their subscribers to determine which stations they preferred to receive."

The court of appeals also gave the following summary of the technology involved in television broadcasting and reception and in the operation of petitioner's systems. A 1347-49.

"Television broadcasting equipment first translates the sight and sound of the program being broadcast into two voltages, the video signal, which measures the intensity of light at each spot on a photosensitive screen inside the camera as it is scanned by an electron beam, and the audio signal which measures the intensity of sound. These two changing voltages are then encoded in a radio frequency carrier wave for broadcasting; the video signal is used to modify, or modulate the amplitude, or maximum strength, of the carrier wave, and the audio signal is used to modulate the frequency of the carrier wave. The modulated carrier wave is then broadcast by an antenna as electromagnetic radiation. When this radiation strikes a home television antenna, it induces a voltage between the antenna terminals which reproduces the modulated carrier wave. The reproduced carrier wave is then conducted into the television set, and there demodulated to yield reproductions of the video and the audio signals. The video signal controls the intensity of a scanning electron beam, which reproduces on the electroluminescent interior of the television tube the image seen by the camera, and audio signal controls the speaker of the set. Since the broadcast radiation propagates at the

speed of light, the whole process of television broadcasting and reception consumes a fraction of a second.

"The radiation broadcast by a television broadcasting station, when it strikes the corresponding antenna of one of defendant's CATV systems, induces in it a reproduction of the station's modulated radio frequency carrier wave just as it does in a home antenna. The CATV system's 'head-end equipment,' housed in a small building near the antennas, then amplifies the carrier wave, converts it if it is a high-frequency, or high-band, VHF wave (channels 7 to 13) to one of the low-band VHF channels (2 to 6) in order to reduce losses in transmission through the system's coaxial cables, narrows its frequency range, and then propagates it as electromagnetic radiation through the system's cables. The radiation, amplified by numerous trunkline and distribution amplifiers along the cables, is transmitted at nearly the speed of light to the terminals of subscribers' television sets, in most cases through matching transformers.

". . . Thus broadcast television programs have never been made visible or audible within defendant's CATV systems. Nor have the systems originated television programs." [12]

As the statement of the court of appeals makes clear, petitioner's CATV systems dealt only with electromagnetic energy, and at no point with the sights or sounds of television programs. They did not change the sights and sounds of programs into electromagnetic energy,

[12] The CATV system in Clarksburg was prohibited by its franchise from the town of Clarksburg from being other than a reception service for broadcast signals. See Sec. 12 of Ordinance, Ex. 3, E. 11, R 135, A 229-30, 1269. The systems were not equipped to, and did not make, recordings of telecasts. A 218.

as the broadcasting station does, nor did they change electromagnetic energy into the sights and sounds of programs, as the television set does. Petitioner did not provide, or have any control over, the subscribers' television sets (A 214, 218), and therefore did not provide to any member of the public an audible and visible rendition of any television program.

As the court of appeals stated, the carrier wave broadcast by the television station in the form of electromagnetic energy strikes petitioner's receiving antennas and induces in the antenna an electric current which is a "reproduction" (*i.e.*, has the same electrical characteristics) of the broadcast carrier wave, "just as it does in a home antenna." A 1348. Petitioner's other equipment "then propagates it [the carrier wave] as electromagnetic radiation through the system's cable." A 1348. This reception and transmission of electromagnetic energy—a process likewise performed by a rooftop antenna, a master antenna of the kind commonly used on apartment buildings, or a rabbit ears antenna attached to the television set itself (A 641-43)—is the sole activity by which petitioner's systems are alleged to have "performed" the copyrighted motion pictures.

D. The Service Areas of Television Stations

Television signals propagate outward from the broadcast station's antenna, their intensity or strength gradually decreasing as the distance from the transmitting antenna increases. The predicted service area of a television broadcasting station is calculated, pursuant to regulations of the Federal Communications Commission, in terms of the station's "Grade A" and "Grade B" "service contours." The Grade B con-

four delimits that area at the perimeter of which television reception of "a quality acceptable to the median observer" is expected to be available at least 90 percent of the time at the best 50 percent of the receiver locations. (For the smaller Grade A contour, the latter figure is 70 percent.)[13] An applicant for a television station construction permit is required to file with the F.C.C. a map showing, by means of these plotted contours, the areas to which it will provide service. Ex. D2, E 348, 378-79, R 1678-79. A revised map must be filed any time the station changes power, antenna height, or antenna location. The contour maps are part of the public file at the Commission for each station.

The Grade B contour is generally accepted by the F.C.C. and the industry as the practical measure of a station's service area. The F.C.C. has used it as a basis for regulations. A recent and most pertinent example is the requirement of the F.C.C.'s comprehensive regulatory scheme for CATV that a CATV

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[13] "Grade A service is so specified that a quality acceptable to the median observer is expected to be available for at least 90 percent of the time at the best 70 percent of receiver locations at the outer limits of this service. In the case of Grade B service, the figures are 90 percent of the time and 50 percent of the locations." F.C.C. *Sixth Report and Order, Television Allocations*, 17 Fed. Reg. 3905, 1 (part 3) Pike & Fischer R.R. 91:601, ¶ 97 (1952) (hereinafter cited as *Sixth Report and Order*). These contours are plotted on the basis of propagation charts and rules set forth in the F.C.C. regulations as applied to data concerning the transmitter (*e.g.*, the power of the transmitter and the height of the transmitting antenna) and the nature of the receiving equipment. 47 C.F.R. § 73.684 (1967); A 868-71; see note 122 *infra*. The charts are based on expected signal field intensities which would be received on an antenna at a height of 30 feet above the ground. 47 C.F.R. §§ 73.684 and 73.698 (Figures 9 and 10) (1967).

system carry upon request the signal of any station "within whose Grade B contour the system is located."[14] Of course, acceptable reception does not end at the B contour; as one moves farther out, the number of locations at which such reception exists simply declines gradually.[15]

In the present case there is no dispute—as there could not be, in view of the public nature of the information—about the relationship between petitioner's CATV systems and the B contours of the five television stations. As the court of appeals stated: "Fairmont is within or on the B contour of four of the stations in suit, and Clarksburg is within the B contour of one." A 1364.[16] Thus, in one-half of the

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[14] *Second Report and Order, Community Antenna Television Systems,* 2 F.C.C. 2d 725, 6 Pike & Fischer R.R. 2d 1717, ¶¶ 66-67 (1966) (hereinafter cited as *Second Report and Order*). See discussion at pp. 94-100 *infra.* See also 47 C.F.R. § 73.636(a)(1) (1967) which prohibits the granting of a television broadcast license to a person owning another television station where an overlap of Grade B contours would result (the so-called "duopoly" rule).

[15] Respondent has attempted to argue that the so-called "radio horizon" marks "the broadcasting stations' actual service areas". Respondent's Brief in Opposition to the Petition at 21. The Grade B contour is beyond the station's "radio horizon"—defined as the point where a line drawn tangential to the earth from the top of the transmitting antenna touches the earth. A 5056-60, 1177-78. Because of a "bending" of the electromagnetic waves (they follow the curve of the earth for some distance), reception beyond the radio horizon is normal, expected, and experienced. A 861-64, 1162-78; Ex. M2, E 413.

[16] Specifically, Fairmont is well within the B contour of WTRF in Wheeling—indeed, it is about equally close to the Grade A contour. Ex. F2, E397, R 1680. Fairmont is also well within the Grade B contour of WTAE in Pittsburgh. Ex. I2, E409 R 1682. And Fairmont is on the Grade B contours of WSTV in Steubenville and KDKA in Pittsburgh. Exs. E2 and G2, E394,

ten system-station relationships presented, petitioner's subscribers (and its systems) are within the Grade B contour of the station whose broadcast signals the systems received and transmitted to their subscribers.

Petitioner at the trial offered to prove that its systems were also within the market areas of the five stations as determined by the economics of the broadcasting industry. The proof would have shown that petitioner's CATV subscribers were included in the contemplated audience of the stations from the points of view both of the advertiser who buys time on the station and of the copyright owner who licenses programs for broadcast.[17] It would have shown that the royalties exacted by respondent from the five stations took into account the anticipated reception of the

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E401, R. 1680. The only one of the five stations whose Grade B contour does not encompass or touch Fairmont is WIIC in Pittsburgh (and it does not fall far short). Exh. H2, E405, R. 1682. Clarksburg, being 18 miles south of Fairmont, is not quite as close to the five stations. Nevertheless, like Fairmont, it is well within the Grade B contour of WTRF in Wheeling, and about as close to the Grade A. Ex. F2, E397. Clarksburg is also very close to the Grade B contours of WSTV in Steubenville and WTAE in Pittsburgh. Exs. E2 and I2, E394, E409. Nor is it far from the Grade B contours of any of the other stations.

[17] The offer of proof (A 1312-24), which was rejected by the district court (A 1327), included such basic economic facts of the television industry as the relationship between a station's circulation (number of viewers) and the rates it can charge and receive from advertisers. The greater the circulation the greater the rates. The proof would have shown that respondent, in setting its prices for licensing its motion pictures to television stations, takes account of the station's circulation and advertising rates, and that the greater a station's circulation and the higher its rates, in general the higher the royalty respondent may demand and receive from the station in licensing it to broadcast respondent's motion pictures.

licensed broadcasts by the stations' entire audience, including petitioner's CATV subscribers, so that respondent had in fact already been compensated for the reception of the licensed broadcasts by not only the public, but the specific members of the public who subscribed to petitioner's CATV systems.[18]

E. The Decisions Below

1. *The district court* relied principally on what it deemed to be the electronic and technological functions of petitioner's equipment.[19] The court emphasized the CATV systems' acts of "electronic reproduction" (A 49, 73, 255 F. Supp. at 192, 204) of the broadcast

[18] Petitioner offered to prove that the statistical method used by the television rating services in determining a station's circulation includes homes connected to CATV systems, that subscribers to petitioner's CATV systems in Clarksburg and Fairmont were credited to the circulation of the five stations here involved, and that those stations knew of, contemplated, and advertised reception of their telecast by CATV subscribers in and around Clarksburg and Fairmont. A 1322-23. Petitioner would also have offered documentary evidence from respondent's files to support its offer. See, *e.g.*, letter to respondent from one of the stations involved (WTRF, Wheeling), dated in 1959, referring to the importance of CATV reception to the station and to the effect of such reception in increasing the rates paid respondent for the licensing of its motion pictures. R 4292.

[19] "The finding that defendant's activity constituted a performance was based on an analysis of the electronic process employed in the defendant's operation. The court found the 'essential feature' of CATV's operation to be that when it received the signals from the TV station and fed them into the amplifying equipment which formed part of its transmission system, it 'created output signals which are replicas in electronic terms of the input signals' and which 'duplicate and reproduce : . . the patterns . . . that originated from the broadcast antenna . . .' The court found that this process of duplication constituted an infringing performance." Note, *CATV and Copyright Liability*, 80 *Harv. L. Rev.* 1514, 1517 (1967) (footnotes omitted).

signals through the operation of the vacuum tubes in the systems' amplifiers. A 47-49, 255 F. Supp. 191-92.[20] Apparently recognizing that such an electronic function of a vacuum tube was not encompassed within the commonly understood meaning of the statutory words "to perform," the court said:

> "On the premise that words are only the means of communicating thoughts or ideas, it may be contended, with a degree of validity, that the words 'to perform,' as commonly used in everyday speech by the average layman, are not intended to encompass the aggregate or composite of the acts of [petitioner's systems]...." A 67, 255 F. Supp. at 201.

The court rejected the common meaning of the statutory language, however, in favor of a process of statutory interpretation which it described as "a judicial application of the principle of semantic extension." A 105, 255 F. Supp. at 213, n.20. The court explained (A 72, 255 F. Supp. at 204):

> "When a CATV system brings the acting or the playing to the audience and makes available to that audience a reproduction of a primary performance (as embodied in the phonograph record, the magnetic tape, or the film, etc.), it is executing a function *that is so closely akin in result* to the primary performance of the copyrighted

[20] "The vacuum tubes in each active or energized electronic unit in defendant's systems produce in the flow of locally supplied electric current a reproduction or duplication of the voltages that were originally supplied to the grid of each vacuum tube as the input signals." A 48, 255 F. Supp. at 192. This technological fact about the operation of a vacuum tube (or transistor) was identified by the court as "the essential feature of defendant's act of electronic reproduction." A 49, 255 F. Supp. at 192.

> work that, for purposes of protecting the copyright proprietor's performance monopoly, the court finds that it *should treat the situation as if there were a classical performance, and attach to it the consequences resulting from an unauthorized performance.*" (Emphasis added.)

On the question whether public reception of broadcasts licensed by the copyright owner is protected by a license implied in law under the Copyright Act and/or the Federal Communications Act, the district court stated simply: "The question being not whether there *is* an implied in law license to perform publicly for profit but whether there *should* be, this court holds that there should not." A 88, 255 F. Supp. at 211 (emphasis in original).

2. *The court of appeals* brushed aside the technological grounds on which the district court had relied, stating that "the result produced by defendant's systems constitutes a public performance, and . . . the technical means by which the result is produced are irrelevant to this issue." A 1357, 377 F.2d at 880, n.9. The "result" which the court of appeals found crucial, and which it held to be "fairly characterized as a public performance infringing the copyrights," was "the simultaneous viewing of plaintiff's copyrighted motion pictures on the television sets" of petitioner's subscribers. A 1350, 377 F.2d at 876. The operations of the CATV systems were held to constitute a "performance" of the motion pictures because of "the magnitude of [petitioner's] contribution" to that "result" taking place in the homes of its subscribers (A 1353, 377 F.2d at 878) even though the reception and viewing by the subscribers were conceded by respondent to be noninfringing.

The court of appeals conceded that "no legislative history indicates whether Congress expressly intended the exclusive right to perform in public to embrace the operation of systems like defendant's" (A 1350, 377 F.2d at 876), and gave virtually no consideration to the meaning of the statutory term "perform". It stated that its conclusion, based on the "result produced" and the "magnitude" of petitioner's "contribution," was reached "in light of prior decisions and of the policies of the Copyright Act." A 1349, 377 F.2d at 876. So far as prior decisions were concerned, the court relied mainly on this Court's decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931). So far as the policies of the Copyright Act were concerned, the only policy recognized by the court as relevant to the issue of "performance" was the Act's "fundamental purpose . . . to protect copyright proprietors against dilution of the market for their works" (A 1353, 377 F.2d at 878)—a policy requiring, in the court's apparent view, exclusive consideration of the extent to which "a television broadcast of a copyrighted work harms the copyright holder." A 1355, 377 F.2d at 879.

On the issue of a license implied in law, the court of appeals recognized that "the question of an implied-in-law license to disseminate a radio or television broadcast is one of appellate first impression.". A 1360, 377 F.2d at 881. The court proceeded to deny the existence of such a license on the ground that: "In an age of motion pictures and radio and television broadcasting, it would seem self-evident that a copyright proprietor must be allowed substantial freedom to limit licenses to perform his work in public to defined periods and areas or audiences . . . ." A 1362, 377 F.2d at 882. Thus

the copyright owner must be allowed, in the court's view, "the right to limit its licenses to viewers who can receive the broadcasts through normal rooftop antennas." A 1363, 377 F.2d at 883. With respect to petitioner's argument that in the absence of an implied license petitioner's subscribers "will in effect pay twice for television programs, once by buying the products and services of the advertisers who support the original broadcast and once by paying for CATV service" (A 1363, 377 F.2d at 883), the court responded that "whatever force this 'double payment' contention may have, it must be made to Congress," inasmuch as "it involves purely legislative considerations" and did not recognize that any relevant policy of the Copyright Act was involved. *Ibid.*

The court of appeals went on, however, to place a limitation on its holding denying the existence of a license implied in law. It sanctioned the copyright owner's right to collect a second royalty through a CATV system only where the CATV system's subscribers "could not receive the licensed broadcasters' signals satisfactorily" by "normal antennas" or "normal rooftop antennas." A 1363, 1366, 377 F.2d at 883, 884. The court stated (A 1366, 377 F.2d at 884):

> "A different case might be presented which we do not decide, if a CATV system's subscribers could receive one or more of the stations carried satisfactorily by normal antennas, as it might then be contended that a copyright holder licensing a broadcast of a work over such a station must be held to have licensed their viewing of the work." (Footnote omitted.)

SUMMARY OF ARGUMENT

I

As the court of appeals recognized, petitioner's CATV systems, in receiving broadcast television signals off the air and transmitting them by wire to the homes of the systems' subscribers, deal only with electromagnetic energy and in no respect with the sights or sounds of television programs. In holding, nevertheless, that petitioner's systems "perform" copyrighted motion pictures "in public," the court below construed the limited statutory monopoly in a manner contrary to the principle established by this Court in *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), that the words of the Act should be interpreted in accordance with their "ordinary sense." Nothing in the legislative history, the language of the statute, or the precedents supports an interpretation that a work is "performed" by operations such as those of petitioner's systems, which do not make the motion pictures audible or visible and do not deal with their content in any way. *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), relied on centrally by the court below, does not support its decision; there the hotel received an unauthorized broadcast and made it audible throughout the hotel on equipment which it owned. Petitioner's CATV systems only receive the broadcast signal and conduct the electromagnetic energy to the homes of the subscribing members of the public; the subscribers who choose to use CATV to assist their television reception view the program on their own television sets. *Jewell-LaSalle* is completely consistent with the "ordinary sense" construction of performance since, as this Court emphasized, the pro-

gram was made audible on the hotel's equipment; the decision does not compel or support the court of appeals' conclusion that "performance" may be found on the basis of the "magnitude" of a "contribution" to the "viewing" of sight and sound by someone else on his own television set.

The rationale of the court below is really a new theory of contributory infringement. Unlike the standard theory, it requires no direct infringement, but is applied here in a situation where both the broadcast and the viewing are conceded not to be infringing. This vague new theory of performance by reason of the "magnitude" of a party's "contribution" to the "result" of "simultaneous viewing" by the subscribers on their own sets will greatly expand the limited monopoly granted in carefully circumscribed statutory language; it will permit copyright owners to restrict, and impose an additional toll on, reception of public broadcasts by members of the public when those citizens decide to enlist the aid of a master antenna or CATV. Thus, apartment house master antennas, so common in our cities, and all cooperative antenna systems, as well as CATV systems, will be subjected to the control of the copyright owner.

The attempt by the court below to justify its theory by analogy to the copyright-infringement liability of broadcasters fails as a matter of law and fact. The cases imposing copyright liability on broadcasters make it clear that the "performance" takes place in the broadcaster's studio—originally "live," but now more often by the playing of a film, tape, recording, or a program supplied by a network—and that the broadcaster's transmission to the public of the electromag-

netic waves into which he has converted the sights and sounds of the program serves to make the studio performance "public." The essence of broadcasting, as the F.C.C. has said, is program origination. A broadcaster is legally responsible for selecting and procuring programs to broadcast for reception by the public. A CATV system, in contrast, is admittedly not a broadcaster. It is not a program originator. It merely receives broadcast signals and transmits those signals to the subscribing members of the public so that they can view the programs in their homes on their own sets.

II

Respondent argues for a theory of performance different from that of the court below, independent of the viewing by the subscribers, based simply on the transmission of electromagnetic energy. This is a variant of respondent's technological argument rejected by the court of appeals. The notion that a "performance" of a motion picture takes place through the transferring from one location to another of electromagnetic energy, in which no one claims or can claim a copyright, expands and distorts the statutory monopoly. Respondent's transmission theory might have an even broader impact than the contributive theory of the court below, since every common-carrier and electronic communications service and, indeed, every television set and antenna installation, and numerous other present and future services for electronic transmission of data, involve transmission of electromagnetic energy. The transmission theory also fails to recognize the holdings of the broadcaster cases that it is not the transmission of electromagnetic energy *per se* which is a performance under the Act.

III

To the extent that it took policy considerations into account, the court below extended the "performance" right to the operations of a CATV system by considering exclusively the secondary policy of the Copyright Act—that of rewarding the author—and without considering the Act's primary policy of making the work available to the public. Once the author has collected his royalty for releasing a particular embodiment of the work to the public, as he has here by licensing the broadcast for reception by the public, the primary policy applies to preclude a construction of the "performance" right which would impose on the public a second toll for reception of the same broadcast. The extension of the statutory monopoly in violation of the primary policy of the Act would in this case lead to severe anticompetitive consequences, which have been pointed out in Congressional testimony by the Department of Justice. The lower court's expansive construction of the copyright monopoly is also in conflict with the policy of the Federal Communications Act, under which broadcasting is intended for free public reception. In addition, imposition of copyright restrictions on CATV would bring the Copyright Act into direct conflict with a key element of the F.C.C.'s regulatory scheme for CATV—the requirement that CATV systems "carry" upon request the signals of television stations within whose "B contours" they are located—which the Commission has found to be in the public interest.

IV

Although these policy considerations are important in construing the exclusive rights under the limited monopoly—especially where there is nothing in the

statutory language, legislative history, or precedent to compel a contrary interpretation—they are also pertinent, and controlling, on the question, specifically reserved by this Court in *Jewell-LaSalle,* whether the public has a license implied in law to receive off the air for viewing on their own sets broadcasts licensed by the copyright proprietor (and to seek the aid of an antenna service such as petitioner's in order to enjoy this right to receive). The copyright owner should not be permitted to impose a second royalty on the public for enjoyment of the broadcast which he has specifically authorized for reception by the public. Respondent's release of a particular embodiment of the copyrighted work, by licensing a broadcast of its motion picture by a particular television station for reception by the public, must be held to carry with it a license implied in law for the public to receive and enjoy that broadcast. And the public's license to receive cannot be restricted to a "do it yourself" basis, but must also protect its right to seek the aid of a CATV system in the reception, without thereby incurring or imposing copyright-infringement liability. When a copyright owner exploits his work through broadcasting, he subjects his rights to the legal and economic structure of the industry and must be held as a matter of law to have licensed the public for whom the broadcast was intended, including members of that public who choose to receive through the aid of CATV.

The court below indirectly recognized the public's right to receive, but limited that right by proposing a standard whereby the operation of a CATV system would be an infringement unless the system could demonstrate that its subscribers "could receive" with "normal rooftop antennas." The court's assumption

that none of the subscribers to petitioner's CATV system met this test is clearly erroneous on the present record. The test, in any event, is vague and unworkabl and unwarranted in law. The public has the right to use whatever kind of antenna it chooses to receive a broadcast off the air, and there is no basis for suggesting that one particular technical and variable fact —the antenna selected for reception—is a reasonable way to mark the limit of the public's right to receive.

If a court is to construct a limit on the public's right to receive a broadcast off the air, it would be more reasonable to use the F.C.C.'s B contour as a measure of a station's normal coverage area. This standard, which the Commission has used in its regulation of CATV, is certain, readily available, and more in accordance with the economic facts; it would provide a more workable measure of expected coverage, if such a limit on the public's right to receive were deemed necessary.

ARGUMENT

I.

THE DECISION BELOW, BY A NOVEL INTERPRETATION OF THE CONCEPT OF "PERFORMING" A COPYRIGHTED WORK, GREATLY ENLARGES THE COPYRIGHT MONOPOLY IN DISREGARD OF THE MEANING AND INTENT OF THE STATUTE AND OF THE PRINCIPLES OF INTERPRETATION ESTABLISHED BY THIS COURT.

The importance of this case and the multitude of its ramifications make it easy to forget that the basic legal question involved is one of statutory interpretation. A statement made by this Court in a comparable case half a century ago provides an appropriate guidepost. The Court there, having reviewed other matters

in its opinion, turned to what it deemed the decisive considerations and stated: "In the last analysis this case turns upon the construction of a statute, for it is perfectly well settled that the protection given to copyrights in this country is wholly statutory." *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1, 15 (1908). The copyright monopoly, a "wholly statutory" creation, is a limited monopoly authorized by the Constitution and granted by Congress as an exception to the general principle against monopolies. As such it "ought to be reasonably construed with a view to effecting the purposes intended by Congress," and it "ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant." *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, 346 (1908). The public policy of the Copyright Act is embodied not only in the monopoly granted but also in the limits placed on those exclusive rights. See *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964); *cf. Brulotte* v. *Thys Co.*, 379 U.S. 29 (1964).

In this case, the relevant provisions of the Copyright Act are §§ 1(c) and (d), which grant exclusive "performance" rights relating to nondramatic and dramatic works.[21] Section 1(c) grants the copyright owner the exclusive right, with respect to non-dramatic

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[21] The courts below did not rule on the charge made in respondent's complaint that petitioner's systems infringed respondent's exclusive right to make copies. A 63. Thus, the issue before the Court is whether petitioner infringed respondent's performance monopoly.

works, "to play or perform it [the copyrighted work][22] in public for profit," and § 1(d) grants the exclusive right, with respect to dramatic works, "to perform or represent the copyrighted work publicly . . . ." Petitioner cannot be held liable for infringement unless its CATV systems "performed" respondent's motion pictures.[23]

As the court below found, "broadcast television programs have never been made visible or audible within defendant's CATV systems. Nor have the systems originated television programs." A 1349. Yet the court held that "the operations of defendant's CATV systems constitute . . . performances." A 1367. In so doing, it did not analyze what the statutory term "perform" means, and did not try to explain how the operations of petitioner's systems in receiving and transmitting electromagnetic energy could be reasonably described as a "performance" of motion pictures.[24]

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[22] Petitioner contended below that the exclusive rights granted by § 1(c) did not extend to the nondramatic motion pictures involved (cartoons), since they were not "literary works" within the purview of the section. See *Nimmer on Copyright* § 107.1 at 399 and § 109.4 at 439 (1967). The district court rejected this contention without discussion.

[23] Although both subsections also utilize the verbs "exhibit," "represent," "produce" and "reproduce," this Court has made clear that they all describe a single performance right. "The Copyright Act confers two monopolies—that of making copies and that of giving public performances for profit." *Jewell-LaSalle Realty Co.* v. *Buck*, 283 U.S. 202, 204 (1931).

[24] The court's rationale seems to have been that the burden was on petitioner to show that its operations were *not* within the statutory monopoly. The court's whole discussion is cast in the terms in which it opens: "Defendant contends that its CATV systems should not be held to have performed plaintiff's copyrighted motion pictures in public because . . . ." A 1349.

A. The Statutory Words Should Be Construed in Accordance With Their Ordinary Sense

This Court has set forth the guiding principles for construing the terms of the Copyright Act. In *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), the Court was confronted with a comparable case involving the claimed applicability of the copyright monopoly to a new industry which "has developed rapidly in recent years," so that the question was "one of very considerable importance." *Id.* at 9. The question was whether player-piano music rolls and other devices for mechanically reproducing music (including phonograph records) were "copies" of the musical compositions within the terms of the Act. Some of the same arguments made on behalf of respondent here were urged by the plaintiff there. But this Court, while recognizing that "it may be true that the use of these perforated rolls, in the absence of statutory protection, enables the maufacturers thereof to enjoy the use of musical compositions for which they pay no value," responded that "such considerations properly address themselves to the legislative and not to the judicial branch of the Government." *Id.* at 18. The Court held, unanimously, that the devices did not infringe because they were not "copies within the meaning of the copyright act." *Ibid.*

In so ruling, the Court made clear that the terms in which Congress has defined the exclusive rights granted to the copyright proprietor are not to be taken as elastic words of art into which a court can pour any meaning that it feels will best effectuate the objective of rewarding the copyright owner. Rather, as the Court repeatedly stated, the words are to be interpreted on the basis of their "ordinary sense" (*id.* at 16), "com-

mon understanding" (*id.* at 17), and "ordinary signification" (*id.* at 12)—the sense in which they are "generally understood" (*id.* at 17).[25]

The court of appeals here ignored *White-Smith* and gave not one word of consideration to the "ordinary sense" or "common understanding" of the word "perform."[26] If the court had considered the ordinary meaning of the word, it would have been compelled to recognize that the normal conception of "performing"

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[25] The aftermath of the *White-Smith* decision is also instructive here. Congress did act to subject the mechanical devices to copyright-infringement liability, but it significantly did not adopt the rule of total liability which this Court had rejected. The Committee drafting the legislation at first intended to do just that, but changed its mind after hearings disclosed the possibility of severe anticompetitive effects. As the House Report stated:

> "It was at first thought by the committee that the copyright proprietors should be given the exclusive right to do what they pleased with the rights it was proposed to give them to control and dispose of all rights of mechanical reproduction, but the hearings disclosed that the probable effect of this would be the establishment of a mechanical-music trust. . . ." *H. R. Rep. No.* 2222, 60th Cong., 2d Sess. (1909), reprinted in *Nimmer on Copyright* 959, 967 (1967).

Accordingly, Congress in the 1909 legislation that became section 1(e) of the present Copyright Act, while bringing mechanical reproductions within the Act (as a separate category and not within the term "copy"), imposed a system of compulsory licensing at a fixed royalty rate; it also established a method for collecting the royalty, enacted an exemption for coin-operated machines, and subjected the whole new right to a grandfather clause. See 17 U.S.C. § 1(e) (1964).

[26] The district court went further and expressly rejected this Court's example, virtually conceding that the word "perform," "as commonly used in everyday speech by the average layman," would have to be held not to encompass the operations of petitioner's systems. A 67; see p. 17 *supra*.

a work, as applied to a sound motion picture, implies the making of an audible and visible representation or exhibition of it. This is the basis on which the term has been expressly defined in copyright statutes of other English-speaking countries.[27] That this "ordinary signification" of "perform" was the meaning intended by Congress in §§ 1(c) and 1(d) is also indicated by the structure of those sections[28] and by their legislative history. The latter makes clear that Congress acted to solve the problem of dramatic works being "performed" on stage and in the process transcribed or recorded for the purpose of producing un-

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[27] The Canadian Copyright Act, *Can. Rev. Stat.* c. 211, § 2(q) (1952), states: " 'performance' means any acoustic representation of a work or any visual representation of any dramatic action in a work, including a representation made by means of any mechanical instrument or by radio communication." See *Canadian Admiral Corp.* v. *Rediffusion, Inc.*, [1954] Can. Exch. 382, 403, discussed in more detail at p. 37 *infra*. The English Copyright Act of 1911, § 35(1), contained an identical definition. Copyright Act of 1911, 1 & 2 Geo. 5, c. 46, § 35. See also *Mellor* v. *Australian Broadcasting Commission*, [1940] A.C. 491, 500.

[28] The exclusive right of performance is granted in sections 1(c) and 1(d) not in some abstract, disembodied form, but with the closest possible reference to the copyrighted work. Section 1(d) reserves to the copyright proprietor the exclusive right to perform or represent publicly "the copyrighted work," to make a record "thereof" from which "it" may be exhibited, performed, or reproduced, and to exhibit, perform, or reproduce "it." Similarly, section 1(c) grants the right to play or perform "it," and to exhibit, represent, produce, or reproduce "it." Thus, there must be something amounting to a public performance of "it," the copyrighted work, which in this case means the motion picture.

authorized "performances" of the same nature.[29] While this does not mean that such a stage presentation is the only kind of performance the Act protects, it demonstrates that Congress used the word "perform" (as in *White-Smith* it was held to have used the word "copy") in its ordinary and commonly understood sense—meaning a rendition of the work which can be perceived by the senses of an observer.

Applying the "ordinary sense" principle of the *White-Smith* case, the conclusion must follow that petitioner's CATV systems did not "perform" respondent's motion pictures. The systems did not make any of the motion pictures audible or visible; they did not originate the programs or handle or exhibit the sights or sounds of programs in any way. They merely received on their antennas, and transmitted through wires to their subscribers, electromagnetic energy, on which no one claims or can claim a copyright.[30] To

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[29] As is shown by the Committee Report on the 1909 Act, the moving force behind enactment of these provisions in the 1909 Act was the complaint of dramatic authors and producers against the practice whereby

> "upon the first production of a dramatic work a stenographer would be present and would take all the words down and would then turn the manuscript over to someone who had hired him to do the work or sell it to outside parties. This manuscript would then be duplicated and sold to persons who, without any authority from the author, would give public performances of the work." *H. R. Rep. No.* 2222, 60th Cong., 2d Sess. (1909), reprinted in *Nimmer on Copyright* 959, 963-64 (1967).

[30] Plaintiff conceded that "No contention has been made that plaintiff, or for that matter anyone else, owns a copyright in the electromagnetic waves broadcast by the television stations and retransmitted by defendant's CATV systems." Plaintiff's Supplemental Memorandum on Copyright Law, R 5459.

hold that these CATV systems "performed" motion pictures departs from the meaning and intent of the statute and from the principle of construction established by this Court.[31]

B. The Decision of the Court Below Is Grounded on a Serious Misinterpretation of This Court's Decision in Buck v. Jewell-LaSalle Realty Co.

In holding that petitioner's CATV systems "perform" respondent's motion pictures, the court below rested its conclusion squarely on this Court's decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931). If the court below was wrong in thinking that *Jewell-LaSalle* compels or justifies the result here, its decision cannot stand.

In *Jewell-LaSalle*—which the court below described as involving "closely analogous facts" (A 1351) to those of the instant case—the LaSalle Hotel in Kansas City maintained a master radio-receiving set which was wired to loudspeakers or headphones in each of the hotel's public and private rooms, over which the hotel's guests, in the words of the court below, "could hear the programs being received on the hotel's master radio." *Ibid.* A local radio station broadcast a copyrighted song without authority from the copyright owner, and the hotel received the broadcast and made it audible through the speaker system. This Court, upon

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[31] The need to focus on the meaning of the statutory term was again demonstrated by this Court in *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55 (1911). The question there was whether the making of a motion picture based on a book infringed the author's exclusive right to "dramatize" his work, and the Court, in holding that it did, relied almost exclusively on a careful analysis of the meaning of the term "dramatize."

a certified question, held this to constitute an infringing performance of the song by the hotel.

The court below, arguing from *Jewell-LaSalle* and also from the district court decision in *Society of European Stage Authors & Composers, Inc.* v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937) (hereinafter cited as *SESAC*),[32] declared: "This, we think, is the nub of *Jewell-LaSalle* and *SESAC*: how much did the defendant do to bring about the viewing and hearing of a copyrighted work?" A 1352. Then, applying its "magnitude of the contribution" test, the court purported to weigh the "contributions" of the hotels in *Jewell-LaSalle* and *SESAC* against that of petitioner's CATV systems here, and announced the conclusion that petitioner's systems had performed the motion pictures because "defendant's CATV systems did far more to bring about the viewing of television programs by their subscribers than the LaSalle Hotel and the Hotel Pennsylvania did to provide radio pro-

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[32] The *SESAC* case, which was not appealed, involved a similar arrangement in the Hotel Pennsylvania in New York. There was a slight technical variation from *Jewell-LaSalle* in that the Hotel Pennsylvania had two master radio sets, each receiving one station, and the guests could switch from one station to the other by turning a knob on the loudspeaker in their rooms. The opinion notes that a witness checked into the hotel and actually heard the song. 19 F. Supp. at 4. The court in *SESAC*, finding a "performance" on the basis of *Jewell-LaSalle*, stated that it regarded "as without significance the differences between the physical arrangements in the LaSalle Hotel and the Hotel Pennsylvania . . . ." *Ibid.* The significant difference between the two cases was that in *SESAC* the broadcast had been authorized by the copyright proprietor, and the district court, deciding an issue expressly left open by this Court in *Jewell-LaSalle*, held that the hotel's acts in receiving the authorized broadcast and playing the song were not protected by any license implied in law. See pp. 72-84 *infra*.

grams for their guests." A 1352-53. (*Cf.* A 1356, where the conclusion is that petitioner's systems did not "far more" but simply "more.")[33]

In interpreting *Jewell-LaSalle* to require a holding of performance in this case, the court below, we submit, misread and misapplied that decision. Far from providing authority for discarding the ordinary-sense meaning of "perform" in favor of a new "magnitude of the contribution" doctrine, *Jewell-LaSalle* was squarely based on the fact that the hotel had provided everything necessary to make the music audible for it guests within its own walls, and had actually made it audible. The question certified to this Court stated the "performance" question as arising from

> "the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loudspeakers *installed in his hotel and under his control* and for the entertainment of his guests, *the hearing* of a copyrighted musical composition which has been broadcast from a radio transmitting station . . . ." 283 U.S. at 195-96 (emphasis added).

The opinion of this Court, by Mr. Justice Brandeis, pointed out that the hotel's acts had included not only

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[33] The court's balancing test, though purportedly based on the "magnitude of the contribution" to the hearing or viewing of the programs, was apparently unaffected by the consideration that the hotels owned, operated, and provided *everything* necessary to make the programs audible for the guests on the hotels' own premises, whereas petitioner's systems only make available the broadcast signal and leave it to the subscribers to purchase, install, and operate on their own premises the receiving set necessary to perform the crucial function of converting the signal into audible and visible programs. See note 11 *supra*.

the reception of the broadcast but also "its translation into audible sound" (*id.* at 200, 201), and that the hotel had produced the music "by instrumentalities under its control" (*id.* at 201).[34] The Court concluded that the acts of the hotel had constituted "essentially a reproduction" (*id.* at 200), which "amounts to a performance" (*id.* at 201), because they had included "the reception of a radio broadcast and its translation into audible sound." *Id.* at 199-200.

Jewell-LaSalle was thus completely consistent with the rule of construction adopted by this Court in the *White-Smith* case. The activities of the hotel which were held to "perform" the music fell squarely within the "ordinary sense" meaning of "perform" because they involved, as the certified question stipulated and the Court repeatedly made clear, the producing of an audible rendition of the work through the hotel's own equipment on the hotel's own premises. Petitioner's CATV systems do no such thing; petitioner provides only the electrical signal, which is transformed into visible and audible programs by the subscribers them-

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[34] Even in the passage from the opinion quoted by the court below, this Court took note that "The transmitted radio waves require a radio receiving set for their detection and translation into audible sound waves," and that the hotel had provided such a receiving set and produced such "audible sound waves." Thus, the Court continued: "The guests of the hotel hear a reproduction brought about by the acts of the hotel in (1) installing, (2) supplying electric current to, and (3) operating the radio receiving set and loudspeakers"—just as they do "where a hotel engages an orchestra to furnish the music . . . ." In either case, "the music is produced by instrumentalities under its [the hotel's] control." 283 U.S. at 200-01, quoted at A 1351-52.

selves on their own premises through their own receiving sets.[35]

There is one other case on which the district court mistakenly relied for its conclusion on the "performance" issue. A 91. *Canadian Admiral Corp.* v. *Rediffusion, Inc.*, [1954] Can. Exch. 382. The district court failed to note, however, that the "rediffusion" operation provided by the Canadian defendant was crucially different from petitioner's CATV systems, in that the Canadian defendant owned the television sets in the homes of its subscribers; it "lease[d] to the subscribers a loudspeaker and a complete terminal unit 'to give full rediffusion service'." *Id.* at 402. The Canadian defendant thus provided all the equipment, including the television sets, for making the programs audible and visible. The Canadian case is fully consistent with the "ordinary sense" of performance and with this Court's holding in *Jewell-LaSalle*.[36]

There is another reason why *Jewell-LaSalle* does not support the decision below. In *Jewell-LaSalle*,

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[35] "In all of the multiple performance cases prior to *United Artists*, [the instant case] an audible performance took place within a commercial establishment which owned the equipment on which the performance took place. *United Artists* goes well beyond these cases in that it prevents the homeowner from enlisting the aid of another to help him receive a broadcast on his own set for enjoyment in his own home." Note, *CATV and Copyright Liability*, *supra* note 19, at 1520 (footnote omitted) (commenting on the district court decision in the instant case).

[36] The Canadian court held that when the programs were made visible and audible on equipment in the system's showroom, this was a public performance and therefore infringing, but that when the programs were viewed in the homes on the terminal units, these were private performances and not infringing. See discussion pp. 39-42 *infra*.

the radio broadcast received and played by the hotel had not been authorized by the copyright proprietor.[37] The broadcast thus was itself an infringement; the copyright owner had received no payment of any kind in connection with the broadcast or with the hearing of the broadcast music by anyone. Moreover, the hotel made the song available on loudspeakers "throughout the building" (*id.* at 195), so that the "performance" rendered by the hotel was in public. In the present case, by contrast, it is stipulated that the broadcasts of respondent's motion pictures were authorized by respondent, and that the members of the public who received the broadcasts and viewed the programs through subscribing to petitioner's systems were innocent of copyright infringement. See p. 5 *supra*. Hence, the reliance of the court below on *Jewell-LaSalle* was misplaced not only because *Jewell-LaSalle* does not support the doctrine that the test of "performance" is "how much" a defendant did "to bring about the viewing and rendition of plaintiff's copyrighted motion pictures"; but also because the case is not applicable where, as in the present case, both the broadcasting and the viewing were authorized and noninfringing.

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[37] This Court thus had "no occasion to determine . . . the effect upon others of [the broadcaster's] paying a license fee" (283 U.S. at 198), and suggested that "if the copyrighted composition had been broadcast by Duncan with plaintiffs' consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied." *Id.* at 199, n. 5; see pp. 72-84 *infra*.

C. The Sweeping New Doctrine of Infringement By Contribution

To find infringement, the court below proclaimed a new doctrine of "performance." The court's holding was that (A 1349-50):

> "the result brought about by one of defendant's CATV systems—the simultaneous viewing of plaintiff's copyrighted motion pictures on the television sets of as many as several thousand of defendant's subscribers—is fairly characterized as a public performance infringing the copyrights."

Thus, what the court held to be "fairly characterized as a public performance" was not the acts done by petitioner's systems, but the acts done by petitioner's subscribers: their "simultaneous viewing" of the motion pictures in their own homes on their own television sets. But respondent has conceded—a fact ignored by the court of appeals—that the activity of the homeowners in receiving the broadcasts and viewing the programs did not make them liable for copyright infringement.[38] If "the result brought about by one of defendant's CATV systems" is concededly a noninfringing one, it is difficult to understand how petitioner's systems can be held liable for infringement on the

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[38] It was stipulated "that the plaintiff herein does not contend that any of the homeowners who received any of the telecast programs are guilty of copyright infringement." A 817. The court below did not attempt to draw distinctions between petitioner's homeowner subscribers and petitioner's commercial subscribers (*e.g.*, hotels, motels, and taverns), and did not suggest that petitioner infringed because it contributed to public performances which might have been given (although there is no evidence in the record on this subject) by such commercial subscribers. Thus the decision below squarely poses the "result" of holding petitioner liable for infringement because it "contributed" to noninfringing performances in the homes.

ground that they bring about that result.[39] It is also difficult to understand, if the performance consists of the "viewing" of the motion pictures by the subscribers in their homes (as the court expressly states), how this can be considered a public rather than a private performance.[40]

This new "performance" theory should be recognized for what it is: a new doctrine of contributory infringement. Thus, the basis for petitioner's liability is made the "magnitude of its contribution to the viewing of broadcast television programs by its subscribers . . . ." A 1353.[41] The new doctrine differs from the standard doctrine of contributory infringement not only in its vagueness, but in being unencumbered by the usual rule that there can be no contributory in-

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[39] It follows from the decision below, in fact, that the members of the public who subscribe to petitioner's systems—and the millions throughout the country who subscribe to other CATV systems—will be liable for contributory infringement, inasmuch as through their subscription contracts they request, contract for, and induce the activity of the system. Respondent is well aware of this, having asserted in its brief in the court of appeals that "defendant's subscribers, who . . . enjoy the reproduction and performance of the television programs 'in the privacy of [their] home,' participate both realistically and in contemplation of law, in a *public* performance." Brief for Plaintiff-Appellee at 40-41 (emphasis in original). See also note 75 *infra*.

[40] See *Canadian Admiral Corp.* v. *Rediffusion, Inc.* [1954] Canadian Exch. 382, 404-409; pp. 41-42 *infra*.

[41] The "nub" of the question, as viewed by the court below, is "how much did the defendant do to bring about the viewing and hearing of a copyrighted work?" A 1352. Questions to be asked by the court applying the doctrine in a given case are whether the defendant "did far more," or "so much," or simply "more" (A 1352, 1354, 1356) than another defendant in another case might have done to "bring about the viewing and audition of plaintiff's copyrighted motion pictures." A 1356.

fringement unless there is a direct infringement to be contributed to. *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U.S. 336, 341 (1961). Thus, even though the reception of the broadcast signal by the subscriber, its translation into the sights and sounds of motion pictures by the subscriber's television set, and the viewing of the motion picture by the subscriber are conceded to be noninfringing—as also is the broadcasting of the programs by the broadcasting station—the CATV system is held liable for infringement because of "the magnitude of its contribution" to this "result."

The court's reasoning assumes *sub silentio* that sight and sound are essential ingredients of a performance, and the court found the sight and sound in the "viewing" by subscribers. But this viewing is at most a private performance, and the "result" to which petitioner was contributing thus could not be more than a private performance.[42] Somehow the court had to find a way to convert this viewing into a public performance by petitioner. The fact that there was more than one such private viewing cannot support any conclusion other than that there was more than one private performance; multiplicity of private performances is not of itself a public performance.[43] Such was the holding of the Exchequer Court of Canada in *Canadian Admiral Corp.* v. *Rediffusion, Inc.*, [1954] Can.

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[42] As stated by the Court in *Jewell-LaSalle* (283 U.S. at 196):

"The parties agree that the owner of a private radio receiving set who in his own home invites friends to hear a musical composition which is being broadcast, would not be liable for infringement. For even if this be deemed a performance, it is neither public nor for profit."

[43] See *Nimmer on Copyright* § 107.42 at 412 (1967).

Exch. 382, 404-409 (see discussion p. 37 *supra*), where the court stated: "I cannot see that even a large number of private performances, solely because of their numbers, can become public performances. The character of the individual audiences remains exactly the same; each is private and domestic, and therefore, not 'in public'." *Id.* at 408. The court below bridged the gap between the private viewing by the subscribers and a public performance by petitioner through judicial fiat and resort to the asserted analogy of a broadcasting station (A 1355-56):

> [I]t is settled that a broadcast or other transmission of a work to the public or a cross-section of it results in a public performance although each individual who chooses to enjoy it does so in private. . . . In any event, it seems clear to us that when one of defendant's CATV systems enables several hundred of its subscribers to view a program simultaneously, it is engaging in one public performance, not several hundred private ones."

The critical point in the court's reasoning is the proposition that by "enabling" many subscribers to operate their own television sets and view the program, petitioner's CATV system is "engaging" in "one public performance." The court does not suggest why it is only "one" public performance, or how many private persons viewing the program are necessary before one public performance could be found. Nor does the court suggest that the CATV system performed the copyrighted work by receiving and transmitting the broadcast electromagnetic waves, and that that performance was then made public by virtue of the fact that the electromagnetic waves were conducted to the homes of many subscribers. The proposition is simply that

"enabling" private viewing becomes without more the equivalent of "engaging" in a "public performance." Such judicial fiat was used by the court of appeals, we submit, to work an unwarranted distortion and expansion of the performance monopoly.

D. The Erroneous Analogy to Broadcasting

The court below attempted to support its new doctrine of performance by analogizing a CATV system to a broadcasting station; it argued that petitioner's CATV systems must have "performed" the motion pictures because broadcasting stations are held to perform copyrighted material embodied in the programs they broadcast. Thus the court stated (A 1354):

> "Moreover, it would seem anomalous to hold that the operation of defendant's CATV systems did not result in[44] a public performance because defendant's subscribers obtained their own television sets, when a television broadcast received on home television sets constitutes a public performance."

For this proposition the court cited *Jerome H. Remick & Co.*, v. *American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir.), *cert. denied*, 269 U.S. 556 (1925). *Remick* does not support the court's reasoning for it involved a performance by an orchestra in the station's studio which was held to be made "public" by the broadcast. See p. 45 *infra*. Recognizing this shortcoming, the court below then argued that the "performance" by the broadcaster cannot take place in the

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[44] The question under the Copyright Act to be decided in this case, we submit, is not whether the operation of petitioner's systems "resulted in" a public performance, but whether it *was* a public performance.

broadcasting studio—as the cases in fact hold[45]—because the visible or audible rendition of the copyrighted work that typically takes place in the studio may be dispensed with in the case of "the broadcast of taped and relayed programs or, usually, of motion pictures." A 1354. The court next resorted to its conception of "the policies of the Copyright Act," arguing that in any event a broadcast of a copyrighted work "harms the copyright holder not because . . . a handful or a roomful of persons sees the work performed at the studio but because thousands of viewers watch it in their homes." A 1355.[46]

Finally, the court was faced with the ultimate facts that broadcasting has a unique status under the Copyright Act and the Federal Communications Act—for example, the broadcaster has a duty under the Communications Act to select and originate programs, and public performance "by broadcast" is expressly recognized by the Copyright Act (see pp. 49-50 *infra*)—and that a CATV system is in no respect a broadcaster.[47] The court's response at this point was to drop the broadcaster analogy and switch back to its basic reliance on *Jewell-LaSalle*: "But the Supreme Court

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[45] See pp. 45-46 and n. 49 *infra*.

[46] The views expressed and applied by the court below as to "the policies of the Copyright Act" are discussed at pp. 58-62, *infra*. Suffice it to note here that what "harms the copyright holder" is not the test of what is infringement under the Act. See *White-Smith Music Publishing Co.*, 209 U.S. 1, 18 (1908), quoted at p. 29 *supra*.

[47] *Report and Order on Impact of CATV Systems and Auxiliary Television Services*, Docket No. 12,443, 26 F.C.C. 403, 18 Pike & Fischer R.R. 1573, ¶¶ 65-67 (1959); *Cable Vision, Inc.* v. *KUTV, Inc.*, 211 F. Supp. 47 (D. Idaho 1962), *rev'd on other grounds*, 335 F. 2d 348 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965).

held in *Jewell-LaSalle* that the hotel performed the broadcast musical compositions although it did not select them." A 1355.

The theory that CATV systems "perform" because broadcasting stations do is no more tenable than the theory that they "perform" because the hotel did in *Jewell-LaSalle*. The answer to the broadcasting theory, and also to respondent's transmission theory (see pp. 55-58 *infra*), begins with the original and archetypal broadcast, which involves a "live" rendition of the work arranged by the broadcaster in his studio. In such a case, what takes place in the studio is audible and visible and clearly a "performance" within the meaning of the Act. This was the situation in the leading *Remick* case, *supra* page 43, cited by the court below. The copyrighted music there had been played "live" by an orchestra in the broadcaster's studio, and the question considered by the court, and decided in the affirmative, was not whether the broadcaster had performed the music—he obviously had—but whether the broadcast had made the performance "public."

Other cases dealing with the "public performance" liability of broadcasters consistently confirm this interpretation that the work is "performed" in the studio and that the broadcast—the broadcaster's dissemination into the air, for reception by the public, of the broadcast waves into which he has converted the sights and sounds of the work—constitutes the means by which that performance is made "public." For example, in the leading English *Messager* case,[48] heavily relied upon by respondent for its "transmission"

[48] *Messager* v. *British Broadcasting Co.*, [1927] 2 K.B. 543, *rev'd on other grounds*, [1928] 1 K.B. 660, *aff'd*, [1929] A.C. 151.

theory (Respondent's Brief in Opposition to the Petition at 17-18), the trial court held that

> "the actual performance of 'The Little Michus' was given in the defendants' private studio on Savoy Hill, London, by the orchestra and performers engaged by the defendants . . . . Officials and a few friends only were present apart from those who rendered the opera." [1927] 2 K.B. at 548

It then noted that the defendants "set in motion certain ether waves," and held that the effect of the defendants' emission of "ether waves" to the public was "to render audible to that public the performance given within the walls of the defendants' studio" (*ibid*)—in other words, to make the private performance in the studio "public." The court thus concluded that "the defendants, in doing what they did, clearly gave a public performance." *Ibid.*[49]

Imposition of "public performance" liability on the broadcaster was supported, of course, by the consideration that the radio or television broadcast served as a substitute for the "live" performance of the work in a concert hall or theater which the members of the public receiving the broadcast might otherwise have at-

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[49] The holding in *Chappell & Co.* v. *Associated Radio Co. of Australia,* [1925] Vict. L.R. 350, was the same as in *Messager.* The defendant there had caused a live performance in its studio. *Id.* at 351, 352, 358. The distinction between the "performance" and the "transmission" is made perfectly clear by the terms of the court's decree, which enjoined the defendant from causing the plaintiff's musical works "to be sung or performed for wireless transmission to the public." *Id.* at 362. Both *Messager* and *Chappell* cite and rely on the leading U.S. case, *Jerome H. Remick & Co.* v. *American Automobile Accessories Co., supra* page 43. See also *Jerome H. Remick & Co.* v. *General Electric Co.,* 16 F. 2d 829 (S.D.N.Y. 1926), cited by the court below at A 1354.

tended, and for which the copyright owner would have received a "performance" royalty as intended by Congress.[50]

Once the broadcaster's liability for a "public performance" was recognized in the case of "live" broadcasts, it followed naturally that the same result should be reached in cases where the broadcaster dispenses with the live performance in his studio and substitutes the playing of a record, tape, or motion-picture film, or a program supplied to him (usually through telephone lines or microwave transmission) by a network. Although the technical methods have changed, all relevant considerations support the same legal result. Even under the specific language of the Copyright Act, there is no reason to doubt that the broadcaster is still "performing" the program material in his studio and making the performance "public" by the broadcast. The Act expressly recognizes that the playing of a record, film, or tape in which the copyrighted work is recorded constitutes a "performance" of the work.[51]

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[50] See the discussion in note 29 *supra* of the legislative history of sections 1(c) and 1(d).

[51] Section 1(d) confers, with respect to a dramatic work, the exclusive right to make a "transcription or record thereof" from which it may be "performed."

Technologically, the station's playing of the film, tape, or record constitutes a processing of the content of the program, and conversion of that content into electrical energy, fundamentally equivalent to the process performed by the station's cameras and microphones with respect to a "live" performance. Thus, the district court found that: "When the tape is run under the readout head of a tape playback unit in the television broadcasting station, the unit acts in much the same way as the television camera and microphone in the case of a live performance," and that in the case of motion picture film, the images are projected within a camera tube in the broadcasting studio and "then scanned by an electronic beam in the same manner as does the television camera in conjunction with a live scene." A 43.

Whatever technical methods are employed, the essential fact remains that, as the F.C.C. has emphasized, "Programming is the essence of broadcasting."[52] Whether the broadcast is "live" or from tape or film or a program supplied by a network, the broadcaster is selecting and procuring the programs that he broadcasts to the public—functions for which he, and he alone, is legally responsible under the Communications Act. Broadcasters "must assume and discharge responsibility for planning, selecting and supervising all matter broadcast by their stations, whether such matter is produced by them or provided by networks or others."[53] This duty of the broadcaster is "personal" under the Federal Communications Act and "may not be delegated."[54]

When a broadcaster decides to obtain his program material from tape or film or a network, he is substituting this program source for the live performance that he would otherwise have staged in his studio. The live

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[52] F.C.C. Form 301 (Application for a Construction Permit) (Ex. D2, E 367, R 1679). The form also quotes the *Report and Statement of Policy, Network Programming Inquiry*, 25 Fed. Reg. 7291, 20 Pike & Fischer R.R. 1901 (1960). Detailed information as to the program sources of a broadcasting station is required in the application.

[53] E. 367. Under the regulations of the F.C.C., a licensed broadcasting station is required to maintain a studio for originating programs (47 C.F.R. § 73.613 (1967)), and to identify itself (by call letters) as the originator of the programs that it broadcasts. 47 C.F.R. § 73.652 (1967).

[54] E 367. A network is not licensed as such to broadcast under the Communications Act. It provides program material by contract to its affiliated stations, which those stations then decide whether or not to broadcast; but the programs selected by the affiliated station are then broadcast—not "rebroadcast"—by the licensed station itself.

performance which was put on the film or tape was indeed recorded with the objective that it be used by the broadcaster as a program source. There is no reasonable basis for concluding that such a substituted program source should relieve the broadcaster of "public performance" liability under the Copyright Act. *Cf. Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191, 201 (1931). And so far as the copyright owner is concerned, the station's broadcast of the work, whatever the technical means employed in the studio, is the basis for compensating him for the public's reception of the broadcast work.

The rule that a broadcast constitutes a performance in public is expressly confirmed by the Copyright Act. The Act was amended in 1952 to extend the performance right under § 1(c) to nondramatic works and at the same time to impose a maximum recovery limit of $100 for innocent infringement of that subsection "by broadcast." Act of July 17, 1952, ch. 923, § 1, 66 Stat. 752.[55] There is no reason to suppose that it makes any difference under this provision whether the broad-

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[55] This amendment was enacted, as found by the court below, "at a time when the first CATV systems were already operating." A 1350. The first system was established in 1948, and by 1952 there were more than 100 serving well over 100,000 subscribers. M. Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry* 50 (G.P.O. 1965).

In view of this provision of the Act, the liability imposed on CATV systems by the court below is truly "anomalous. Whereas a broadcasting station which innocently broadcast a copyrighted nondramatic work without authority from the copyright owner could only be held liable for $100, a CATV system which in equal innocence received and transmitted to its subscribers the same broadcast from the same station would have no such limit on its liability.

caster stages a live performance in his studio, broadcasts from a record or tape or film,[56] or broadcasts a program which he has contracted to have supplied to him by a network.[57]

Of the various characteristics peculiar and essential to the broadcast function that produce the broadcaster's "public performance" liability, not one is applicable to petitioner's CATV systems. They are in no respect engaged in "broadcasting."[58] They do not select, procure, or originate programs; they are in no respect responsible for programs. They sell no advertising as the broadcaster does. They do not convert the sights and sounds of programs—whether in the form of a live performance or of information stored on records, tape, film or from a network—into electromagnetic waves for transmission through the air to the public. They do not deal in this or any other respect with the content of programs, but only with electromagnetic waves. Even as to those waves, petitioner's systems do not radiate them out into the air for reception by the public at large, but receive them after they have been so disseminated and transmit them through wires to the particular premises of members of the public who

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[56] See *Associated Music Publishers* v. *Debs Memorial Radio Fund*, 46 F. Supp. 829 (S.D.N.Y. 1942), *aff'd*, 141 F. 2d 852 (2d Cir., 1944), *cert. denied*, 323 U.S. 766 (1944).

[57] The only case holding a broadcasting station liable in the network type of situation is *Select Theatres Corp.* v. *Ronzoni Macaroni Co.*, 59 U.S.P.Q. 288 (S.D.N.Y. 1943). See also *Law* v. *National Broadcasting Co.*, 51 F. Supp. 798 (S.D.N.Y. 1943) (suit against network); *Davis* v. *E. I. du Pont de Nemours & Co.*, 249 F. Supp. 329 (S.D.N.Y. 1966).

[58] See authorities cited note 47 *supra*.

have elected to use this service.[59] Petitioner's systems do not produce, and never have produced, "live" performances in studios (they do not have studios) which are then made public through the broadcasting process; the technical operations of the systems are thus in no sense a substitute for a live performance. And finally, the hearing and viewing of the telecast programs by petitioner's subscribers in their own homes is not an enjoyment of the copyrighted work for which the copyright owner will receive no payment unless he can collect from petitioner, for the copyright owner has already been paid for that very broadcast by the broadcasting station.

The contrast between the intimate and necessary involvement of the broadcaster in the procurement and origination of programs, and the absence of any such relationship between petitioner's CATV systems and the programs, underlines the difference between a broadcaster and a CATV system. The broadcaster, in the words of the F.C.C., is legally and personally responsible for planning, selecting and supervising programs for broadcast. He deals with program sources: networks, movie owners such as respondent, and live performers. He knows who they are; negotiates the fee for the license to broadcast, schedules the program for broadcast and sells advertising to be broadcast as commercials. The CATV system has no involvement with programming; its charges are for the antenna service and unrelated to programs. Moreover, the

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[59] The Communications Act makes a clear distinction between "broadcasting" and "radio communications" on one hand (47 U.S.C. § 153(o), (b)) and "wire communications" on the other (47 U.S.C. § 153(a)).

CATV system has no way to identify the person or persons who own the copyright on the program material; it does not know for certain what programs will be broadcast. And even if the copyright owner could be identified, there is no way in which he could be located. If he could be located, the negotiations would normally be after the broadcast, when there is no basis for negotiation but only for payment of amounts demanded or for litigation as to damages.

In sum, contrary to the court below, it would be anything but "anomalous" to hold that petitioner's systems do not perform copyrighted works in public although broadcasting stations do. It would simply be a recognition that broadcasting stations have unique functions and attributes which account for their public-performance liability, and that petitioner's CATV systems share none of those characteristics. The attempt of the court below to establish "infringement by analogy" by comparing petitioner's CATV systems to broadcasting stations is no more successful—and no more permissible an interpretation of the "public performance" right—than its attempt to compare them to the hotel in *Jewell-LaSalle*.

E. The Sweeping Consequences of the New Theory of Contributory Performance

One may well wonder how the court of appeals' new doctrine of contributory performance, if allowed to stand, would be applied to other cases. There is no doubt that it contains a great potential for further expansion of the performance monopoly over radio and television reception and other current and future methods of communicating information by electronic means. Since "the technical means by which the result

is produced are irrelevant to this issue" (A 1357 n. 9),[60] there will be an infringing performance whenever "simultaneous viewing" by "as many as several thousand" (A 1350)—or "several hundred" (A 1356)—members of the public is a "result produced" (A 1357 n. 9) by a defendant's challenged activity, depending on "the magnitude of its contribution" (A 1353) to the viewing of the programs.

The fact is that a great variety of persons and services "contribute" to the "result" of the "simultaneous viewing" of television programs by members of the public. Among these are the manufacturers and distributors of television sets and television antennas; the common carriers that provide the communications lines between network facilities and affiliated stations; and the public utilities that provide the electric power which operates the public's television sets. All these services are indispensable to the viewing of television programs by the public, and any of them might be deemed, under the amorphous doctrine of "performance" conceived by the court below, to "contribute" "as much" or "more" to the public's "simultaneous viewing" than was contributed by petitioner's CATV system in this case.

One particularly important type of aid to television reception, in addition to CATV itself, will be branded as infringement if the decision below is al-

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[60] The court of appeals made it perfectly clear that its decision was not based in any way on the equipment utilized. It stated that its "decision would be unchanged if defendant's system had made no use of amplifiers." A 1357 n. 9. Respondent has revived a technological argument rejected by the court below in contending that the performance by the CATV is in the "transmission" of electromagnetic energy. See pp. 55-58 *infra*.

lowed to stand. These are the "master antennas" that are commonly used by apartment houses and other buildings in urban areas to aid television reception by the tenants.[61] The equipment and functions of such master antenna systems are essentially identical to those of petitioner's CATV systems,[62] and there is no reason to doubt that, under the doctrine of the court below, the "magnitude of the contribution" made by such systems to the "simultaneous viewing" of television programs by the tenants connected to the system (who may number, of course, into the thousands) is as great as that of petitioner's systems here. On the basis of the decision below a court would have to conclude that the apartment-house landlord operating such a master antenna was guilty of copyright infringement—with the result, generally, of bringing about a rent increase for the tenants in order to pay for the landlord's copyright royalties.[63] Infringement liability

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[61] A relatively recent estimate was that in New York City "about 750,000 dwelling units received TV from master antennas." Broadcasting Magazine, Dec. 5, 1966, at 9.

[62] See petitioner's offer of proof as to the comparability of the equipment. A 902-04. See the testimony of respondent's expert witness that the function is the same. A 641-42.

[63] The caveat of the court below that it was not deciding a case where "a CATV system's subscribers could receive one or more of the stations carried satisfactorily by normal antennas" (A 1366) would not exempt master antenna systems in large cities. Apart from the onerous burden of proof that would be placed on a master-antenna defendant to show what stations the various tenants could or could not receive satisfactorily with "normal antennas", it is well known that obstruction from tall buildings in such cities often prevent satisfactory reception of local television stations, especially for residents of lower-floor apartments. See pp. 88-89 *infra*.

would also be imposed on the many cooperative antennas.[64]

The "contributive" theory of a performance expressed in the opinion of the court below is a novel one with many possibilities for judicial extensions of the copyright monopoly. Petitioner submits that extensions of a limited statutory monopoly should be left to Congress, and that the present Copyright Act should be construed in accordance with principles established by this Court in *White-Smith.*

II.

THE MERE TRANSMISSION OF ELECTROMAGNETIC ENERGY DOES NOT CONSTITUTE A "PERFORMANCE."

Apparently recognizing the untenable nature of the rationale for "performance" adopted by the court below, respondent has abandoned the court's contributory theory of performance, and argues for a theory that would find a "performance" by petitioner's CATV systems independent of the "viewing" by the subscribers.[65] Respondent's theory is that the CATV systems are liable because they receive and "transmit" or "retransmit" the broadcast signals. "Petitioner's retransmission of a broadcast to its thousands of subscribers is itself a performance . . .," respondent states,[66] and it is irrelevant whether sight and sound are produced by the CATV system or whether any subscriber views the motion picture. Transmission of

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[64] It should be noted that section 1(d) of the Act contains no requirement that the public performance of a dramatic work be for profit, so that the profit aspect of petitioner's business is irrelevant to the court's holding of infringement under that section.

[65] Respondent's Brief in Opposition to the Petition at 25.

[66] *Id.* at 12. See also *id.* at 13, 18, 21, 22, 23, 25.

electromagnetic energy, in and of itself, is made, in respondent's argument, the equivalent of "performance," as if the word "transmission" had been used in the statute, and despite the fact that respondent cannot and does not claim any copyright in the electromagnetic energy which is transmitted. Respondent, too, turns to the broadcast station's copyright liability for an analogy, but the cases supply no more support for respondent's "transmission" theory than for the rationale of the court below.

Respondent's transmission theory is a variant of the technological argument respondent made in the courts below. Although the district court accepted such a theory,[67] the court of appeals rejected the ap-

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[67] The district court found a "performance" in the electronic operation of petitioner's CATV equipment, its primary theory being that electronic "reproduction" of the carrier wave was accomplished by each tube in each amplifier. See pp. 16-17 and note 20 *supra*. Under this theory there would be infringing "reproductions" of the copyrighted work by every tube in every radio or television set (a television set has 20 to 30 tubes), as well as in every master antenna system, every individual antenna installation using amplifiers, in the thousands of amplifiers used by the telephone company and other common carriers, and in the innumerable other electronic appliances and devices that use amplifiers tubes, or transistors.

An alternative technological theory of performance embraced by the district court related to "modulation" of carrier waves, a process which took place in one piece of equipment used by petitioner at one time and which the court found "electronically the same" as modulation by a broadcaster. A 57. However, as the record shows and as the court of appeals noted (A 1348-49), only one piece of equipment used by petitioner at one time "modulated" carrier waves, and then only for the visual carrier and not for the sound waves. A 532. Modulation is not necessarily performed by CATV equipment. See A 47, 209-10, 530-31, 734-35. Indeed, it was a weakness resulting in distortion of the signal. A 896.

proach, concluding that "the result produced by defendant's systems constitutes a public performance, and that the technical means by which the result is produced are irrelevant to this issue." A 1357. Respondent now revives a technological argument based on transmission.

Transmission is the process of transferring an electric signal from one location to another. Electromagnetic waves are "transmitted" by every cable or wire running from every receiving antenna to a television set or a radio set. They are also transmitted, albeit for only a short distance, within each television set itself. A 554. The *Remick* case and the *Messager* case, pp. 45-46 *supra,* make it clear that performance is separate from transmission. Transmission may have copyright significance but only if the person "transmitting," for example, a broadcaster, has first made a performance and then by the transmission makes that performance public.

Respondent's theory of performance based on transmission of electromagnetic energy encompasses not only every television set and radio set but every apartment-house master-antenna system and every communications common carrier. Communications common carriers, such as the American Telephone and Telegraph Company, provide transmission service both intracity and intercity to television networks and stations. In addition, there are now being developed, as the district court noted (A 103), many new devices to transmit sounds, pictures, documents and data through electronic transmission—all of which would bring the "transmitter" within respondent's doctrine of "performance." It is difficult to believe that the "ordinary sense" or "common understanding" of

"performance" in the Copyright Act encompasses such a sweeping expansion of the monopoly.

The notion of "conjuring with transmission" has recently been discussed by Professor Benjamin Kaplan in comments which, although made in the context of proposed new legislation, are also pertinent here:

> "In a deeper view the copyright question is seen as but one phase of the problem of the place of CATV systems in national communications. . . . Instead of conjuring with 'transmission,' we have to consider whether clamping down copyright controls would have any hurtful anticompetitive effects, or would be consistent with the declared purposes of the Federal Communications Act, or would serve as a desirable means of correcting the hardships which CATV systems may visit on TV stations in the same localities." *B. Kaplan, An Unhurried View of Copyright,* 105-06 (1967) (printed earlier in 66 *Colum. L. Rev.* 831, 844 (1966)).

III.

THE DECISION BELOW EXTENDING THE "PUBLIC PERFORMANCE" MONOPOLY TO CATV OFFENDS THE PRIMARY POLICY OF THE COPYRIGHT ACT, DISREGARDS THE ANTICOMPETITIVE CONSEQUENCES THAT WOULD FLOW FROM ITS RESULT, AND PUTS THE COPYRIGHT ACT INTO CONFLICT WITH THE POLICY OF THE FEDERAL COMMUNICATIONS ACT AND THE REGULATORY SCHEME ESTABLISHED UNDER THAT ACT BY THE F.C.C.

A. The Primary Policy of the Copyright Act

The Court below justified its conclusion on the performance issue in terms of "the policies of the Copyright Act." A 1349. In fact the court invoked only a single Copyright Act policy: that of rewarding the copyright proprietor. The "policies" of the Act boiled down, in the court's view, to the question of whether

a challenged activity "harms the copyright holder." A 1355. The only "fundamental purpose of the exclusive right of public performance" that the court recognized was "to protect copyright proprietors against dilution of the market for their works." A 1353.[68]

Yet this Court has made clear that rewarding the copyright proprietor is not the exclusive or even the primary policy of the Copyright Act. "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *Mazer* v. *Stein,* 347 U.S. 201, 219 (1954).[69] The primary consideration is to make available to the public the benefits of authors' works—"to induce release to the public of the products of [the author's] creative genius." *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 158 (1948).[70]

This primary policy of the Copyright Act, embodied in the limits placed on the exclusive rights granted to the copyright proprietor, is in accord with the general policy in our law against according private economic monopolies in the absence of overriding countervailing considerations. It means, at the very least, that in a particular case where a court must decide whether

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[68] The district court likewise justified its result as one that "effectuates the predominant purpose and policy" of the Copyright Act (A 94) and recognized no purpose or policy other than that of "protecting the copyright proprietor's performance monopoly.". A 72.

[69] *Accord, United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); *United States* v. *Loew's, Inc.*, 371 U.S. 38, 46 (1962).

[70] See *Fox Film Corp.* v. *Doyal*, 268 U.S. 123, 127 (1932); *H. R. Rep. No.* 2222, 60th Cong., 2d Sess. (1909), reprinted in *Nimmer on Copyright* 959, 967 (1967); *cf. Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964).

specified activity falls within the statutory monopoly, the "policies" of the Copyright Act do not invariably favor extending the monopoly in order to increase the reward to the copyright owner, and the consequences of an extension should be carefully weighed where the activity in question is not clearly within the Congressional intent. The limited monopoly granted by Congress should not be construed so as to offend its primary policy or to create anticompetitive consequences not specifically contemplated by Congress.

Policy considerations should be decisive on a novel question of interpreting the "performance" monopoly, where even the courts below recognizd there is nothing in the language or legislative history of the Act, or in the case law, directing a conclusion of infringement. Yet the court below, while purporting to consider the "policies" of the Act, considered only the secondary policy and not the primary one.[71]

The Act's primary policy is offended, petitioner submits, by the court's conclusion that petitioner's systems "publicly perform" respondent's motion pictures. Under that policy, the controlling consideration is the fact that the motion pictures were licensed by respondent to the broadcasting stations for broadcast for reception by the public.[72] If respondent wishes to exploit

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[71] The court expressly declined to consider the primary policy as relevant to the performance issue (A 1360 n. 10), and with respect to the license issue dismissed the policy on the ground that "it involves purely legislative considerations." A 1363.

[72] The court below recognized that the copyright owner had released the work for broadcast to the public but apparently concluded that the public did not include those who decided to use petitioner's services to assist their reception. Thus the court stated that "a different case might be presented" if petitioner's subscribers could receive the broadcasts with a "normal antenna." A 1366. See discussion pp. 84-90 *infra*.

its copyright through broadcasting, it must subject its copyrights to broadcasting's physical and legal structure.[73] As a matter of law under the Communications Act, broadcasting stations, which are granted a license to use a portion of the public's frequency spectrum, broadcast their signals intending them to be received by the public.[74] Respondent received a reward satisfactory to it for permitting each broadcast of the motion pictures by the broadcasting station to the public. Indeed, because of the economic structure of the television industry, the royalty extracted by respondent from the broadcasting station took into account the presence of petitioner's CATV subscribers within the station's audience. See pp. 90-94 *infra.*

Thus, by virtue of the license granted by respondent to the station, the objective of rewarding the copyright owner sufficiently "to induce release to the public of the products of [the author's] creative genius" (*United States* v. *Paramount Pictures, Inc., supra,* 334 U.S. at 131, 158 (1948)) was satisfied. So far as each particular licensed broadcast is concerned, the Act's primary policy of making available to the public the benefits of the author's work should then be controlling. And that policy would be offended by allowing the copyright owner to restrict the reception of the broadcast off the air by the public in order to obtain

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[73] See *Buck* v. *Debaum,* 40 F. 2d 734, 736 (S.D. Calif. 1929), quoted at note 86 *infra.*

[74] 47 U.S.C. § 153(o) defines "broadcasting" as "dissemination of radio communications intended to be received by the public. . . ."

a second reward for that reception.[75] The primary policy of the Copyright Act thus argues clearly and strongly against an interpretation holding the operations of a CATV system such as petitioner's to constitute an infringing "public performance."[76]

B. Anticompetitive Consequences

Where CATV is concerned, the policy against unnecessarily extending the economic monopoly of the copyright owner is reinforced by a special consideration. This is the real danger that imposition of copyright liability on CATV systems, as through the decision below, would have harmful anticompetitive consequences. The Department of Justice has expressed the view that competition would be harmed in at least three significant respects:[77]

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[75] It is respondent's position, as expressed in its brief in the court of appeals that "it makes no difference how much the copyright owner collects, whether once, or twice, whether much or little, so long as it is acceptable to him." Brief for Plaintiff-Appellee at 93.

Respondent in fact would not be content with a second royalty for a single broadcast, but has said that it will seek at least a third. In its brief in the court of appeals respondent expressly reserved an infringement claim against "defendant's commercial subscribers" who maintain television sets open to the view of the public in such establishments as hotels, restaurants, bars, and stores. *Id.* at 68 n. 73. In addition, even petitioner's homeowning subscribers could be liable for contributory infringement under the decision below. See note 39 *supra*.

[76] If a case arose in which the broadcast were not authorized, the copyright owner could of course recover from the broadcasting station.

[77] *Hearings Pursuant to S. Res. 201 on S. 1006 Before the Subcomm. on Patents, Trademarks and Copyright of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. at 212-213 (1966). A Senate Subcommittee in August, 1966, had before it a provision in a copyright-revision bill which would have accomplished the same

"First, the nature and composition of the CATV industry may be transformed . . . . Ownership and control of copyrights is highly concentrated in the networks, movie studios and other television producers. . . .

. . . .

"Given the power to subject CATV systems to copyright liability, the networks or the other large copyright holders might withhold permission to rebroadcast their programs and thereby seek to reserve the CATV market for themselves. . . . Moreover, were the copyright owners to achieve control of a substantial portion of the CATV business, they could impede entry of other independent operators into the field by refusing to allow such potential competitors to carry their programs. . . .

"A second possible anticompetitive development could arise if Congress or the Federal Communications Commission should decide to allow CATV systems to originate their own programs. CATV then could compete with existing networks, providing an additional market for program producers and an important channel for reaching the viewing public apart from the existing major networks. Assuming the potential development of such competition, it would be clearly undesirable to allow networks to use their ownership or control of pro-

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result as the decision below in this case—the result of subjecting CATV to copyright-infringmeent liability. In a statement delivered by the Acting Assistant Attorney General in Charge of the Antitrust Division, the Justice Department opposed the provision on the basis of its belief "that this explicit and blanket extension of copyright liability to CATV systems raises possibilities of harmful anticompetitive consequences and that this extension is not justified by valid considerations of the right to copyright protection." The Department said it had "reached these conclusions after considering the probable effect of the proposal upon competition and upon broadcasting regulation, and the extent to which it furthers interest protected by the copyright law." *Id.* at 211-212.

gram copyrights to extend their power into ownership of CATV facilities, or to limit the independence of CATV operators. . . .

"Finally, CATV systems run a second communications cable into each house that they serve. This cable may in the future also provide access to many new electronic service industries. If . . . a few large copyright holders directly or indirectly control this second wire, it may discourage the development of competition in these prospective industries."

In addition to the possible "harmful anticompetitive consequences" pointed out by the Department of Justice, there is another anticompetitive aspect of the result reached by the court below. If allowed to stand, the decision will empower the networks and the few other companies that control most television copyrights to solidify, elaborate, and perpetuate their present system of exclusive territorial licensing of television markets. It is clear that this is the major copyright holders' primary objective in this case and related litigation.[78] And the court of appeals, in imposing on CATV the liability that the copyright holders seek, has given its express blessing to territorial restrictions on off-the-air reception, stating that "in an age of motion pictures and radio and television broadcasting, it would

[78] The Columbia Broadcasting System, for example, upon filing its suit against a CATV company, now pending before the same District Judge that decided this case and awaiting disposition of this case by this Court (see *Columbia Broadcasting System, Inc.* v. *TelePrompTer Corp.*, 251 F. Supp. 302 (S.D.N.Y. 1965)), issued a press release saying it did not seek the copyright power over CATV as a source of income but as a means of preserving "the present system of nation-wide program distribution by television networks through their affiliated stations." CBS Press Release, Dec. 11, 1964.

seem self-evident that a copyright proprietor must be allowed substantial freedom to limit licenses to perform his work in public to defined periods and areas or audiences . . . ." A 1362. The decision below thus clears the way for the copyright holder in licensing his programs to draw exclusive territorial lines around broadcasting stations—forbidding off-the-air reception by CATV, master antennas, or cooperative antenna systems—whenever, wherever, and however the result would be, in his judgment, to increase his total reward. Such a power would be inconsistent not only with the policies of the antitrust laws (*cf. United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)), but also with the authority given the F.C.C. under the Communications Act "to establish areas or zones to be served by any station." 47 U.S.C. § 303(h) (1954).[79]

The anticompetitive implications of the decision below are cast into sharp relief when it is realized that the CATV systems would have no bargaining power in attempting to negotiate copyright licenses and would be at the mercy of the copyright owners. As a practical matter, they would normally be unable to negotiate at

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[79] See Note, *CATV and Copyright Liability*, *supra* note 19, at 1526-28. The prospect of territorial restrictions inconsistent with the public interest under the antitrust laws or the Communications Act is not speculative; nor is it limited to the prescribed service areas of the broadcasting stations as presently regulated by the F.C.C. In the present case, respondent in its licensing contracts with the broadcasting stations has purported to limit their right to broadcast the licensed motion pictures to the Grade A contours of the stations. Ex. O, Clause Twenty-Fifth, E 343, A 1296. Moreover, respondent has asserted in its form license contract the right to prevent the public from utilizing the service of a CATV system, even when located in the same community as the television station, to receive the broadcast. *Id.*, Clause Second and Twenty-Fourth, E 340, 343.

all in advance of the broadcast (and hence the infringement). A CATV system has no control over what is to be broadcast and, since announced programs are frequently changed by the station, no reliable advance knowledge either.[80] Even if some machinery could be privately created for advance notification and identification of the copyright owner, the CATV system would have no basis for bargaining with him. Unlike the broadcasters who may choose between and bargain in advance with several alternative program suppliers, the CATV system's only alternative to paying whatever the copyright owner demanded (assuming the copyright owner was willing to consider granting a license) would be to turn off reception of the broadcast in question (a course of action which would not long be tolerated by the system's subscribers). After the broadcast, if it was received, there would of course be no choice for the system but to pay or litigate the damages. It is quite unlikely that CATV with its presently diverse ownership could continue to exist under such a regime; the foreseeable result is that the systems would be taken over by the copyright owners.

The court below took no note of the danger that a decision imposing copyright liability on CATV would have these "harmful anticompetitive consequences." Petitioner submits that in a case like the present one, presenting an issue of first impression as to the scope of a statutory monopoly, a court not only can but should take account of authoritative indications that a deci-

[80] The problems of advance clearances for CATV were described by the Deputy Register of Copyrights, in connection with copyright revision legislation, as "a real problem that cannot be brushed under the rug." *Hearings on Copyright Law Revision Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess., ser. 8, pt. 1, at 36 (1965).

sion extending the monopoly would have harmful anti-competitive consequences. *Cf. International News Service* v. *Associated Press,* 248 U.S. 215, 262-267 (1918) (Brandeis, J., dissenting); *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U.S. 488 (1942). To do so is not to intrude on the legislative realm, but simply to recognize the heightened impact, in the circumstances, of the judicially cognizable policy which disfavors economic monopolies and hence favors strict judicial construction of the exclusive rights of the copyright proprietor. *Cf. Sears, Roebuck & Co.* v. *Stiffel Co.,* 376 U.S. 225, 228-30 (1964).

C. The Conflict With the Policy and Regulatory Scheme of the Communications Act

The Court in granting certiorari in this case set it down for argument with *United States* v. *Southwestern Cable Co.,* No. 363. The issue in that case is whether the F.C.C.'s rules regulating non-microwave CATV are valid. If this Court affirms the decision of the Ninth Circuit that the F.C.C. had no authority to issue the rules, there could be no direct and present conflict between those rules and the Copyright Act as construed by the court below, although the court's decision would still conflict with the policy of the Communications Act (see pp. 79-84 *infra*) and with valid regulations that the Congress might subsequently authorize the F.C.C. to issue in pursuance of that policy. If the Court holds the F.C.C. rules valid, however, there arises a direct and substantial conflict between the existing regulatory scheme for CATV under the Communications Act and the Copyright Act as construed by the court below.

That an Act of Congress should be judicially construed, where possible, to harmonize rather than con-

flict with other Acts of Congress applicable to the same subject matter hardly requires argument. See *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797, 806 (1945); *United States* v. *Hutcheson,* 312 U.S. 219, 231-32 (1941). The construction of the Copyright Act by the court below indeed puts that statute in conflict with the policy of the Communications Act favoring free public reception of licensed broadcasts. See pp. 79-82 *infra.* The principle of construing a statute to avoid such conflicts if possible has special force, however, when a proposed novel application of one statute would interfere with a comprehensive regulatory scheme established under another statute and applicable to the same aspects of the same activity. Thus in *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963), this Court interpreted the Sherman Act not to apply to the practices charged because, under the Civil Aeronautics Act of 1938, they were subject to the regulatory jurisdiction of the C.A.B.[81]

The principle is preeminently applicable to the present case. The F.C.C., after initially declining jurisdiction over CATV, has issued and put into effect a comprehensive and detailed regulatory scheme governing all CATV operations. Initially, the Commission adopted rules relating only to CATV systems which utilized microwave retransmission. *First Report and Order on Microwave-Served CATV,* 38 F.C.C. 683, 4 Pike & Fischer R.R. 2d 1725 (1965). The rules subse-

[81] The *Pan American* case makes clear that the principle is unaffected by the views of the administrative agency with respect to the question before the court—by the agency's wish, for example, that the court would take jurisdiction of the subject matter and thus relieve it of a troublesome regulatory problem. Thus it made no difference in *Pan American* that the Sherman Act suit had been brought by the Government at the request of the C.A.B.

quently adopted for nonmicrowave CATV systems such as petitioner's—aptly described by the court below as "detailed" and "carefully graduated" (A 1366-67)—are set forth and explained at length in the F.C.C.'s *Second Report and Order on Community Antenna Television Systems, supra* note 14.

In the *Second Report and Order* the Commission stated that CATV systems "have arisen in response to public need and demand for improved television service and perform valuable public services in this respect." *Id.* ¶ 47. The Commission also found, however, that CATV operations raise certain specific problems from the communications point of view, and it employed its administrative expertise and flexibility to deal with these problems in carefully tailored ways. Thus, in order to assure local television stations (especially UHF) the audience in their service area represented by the subscribers of CATV, the Commission imposed (with exceptions not material here) a "carriage rule." That rule requires a CATV system to carry, upon request of the station, the signal of any station within whose B contour the system is located (sometimes referred to as the "local" station). *Id.* ¶¶ 66-67.[82] In order to protect the normal market of the "local" station, the rules prohibit CATV systems from carrying an "outside" signal which duplicates on the same day a program broadcast by the "local" station (*id.* ¶¶ 51-65).[83]

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[82] The rules also contain a general prohibition (subject to a grandfather clause and to possible waivers by the F.C.C. on the basis of a showing of consistency with the public interest) against CATV carriage of outside signals into the 100 most important television markets (*id.* ¶ 141).

[83] These regulations are similar to the carriage and nonduplication provisions earlier adopted with respect to CATV systems using microwave. See note 123 and Appendix pp. 105-109 *infra*.

In issuing the rules, the F.C.C. expressed the judgment that they "represent a fair balancing of the competing interests, and properly accommodate both industries and thus, the public interest "in the larger and more effective use of radio."" *Second Report and Order* ¶ 109 (quoting and citing § 303(g) of the Communications Act, 47 U.S.C. § 303(g)).[84]

The decision of the court below, however, would impose a general rule of copyright-infringement liability for CATV systems. By subjecting CATV to the power of the copyright owners, it would substitute the control of private parties acting in their own interest for regulation in the public interest by the F.C.C.[85] Whereas the F.C.C. has expressed the judgment that its rules "represent a fair balancing of the competing interests" and serve the public interest "in the larger and more effective use of radio" as required by § 303 (g) of the Communications Act, the imposition of copy-

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[84] In testimony before the Senate Subcommittee on pending copyright revision legislation, (see pp. 63-64 and n. 77 *supra*), the Department of Justice has pointed out that the imposition of blanket copyright liability on CATV "may unjustifiably interfere with sound regulatory policies. . . . It would seem preferable to leave the FCC free to regulate CATV in terms of the public interest than to require it to regulate within the framework of a statute that may allow the networks or other copyright holders to control CATV." *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 77, at 215.

[85] It has been noted that "These FCC carriage rules meet some, but not all, of the concerns of copyright holders," the "most substantial gain for the copyright holder" being the prohibition of CATV carriage into the top 100 markets. The commentator concludes that "for the present, the FCC's rules appear to strike a reasonable balance between protecting the interests of the copyright holders and achieving FCC objectives . . . ." Note, *CATV and Copyright Liability, supra* note 19, at 1531-32.

right liability, as by the decision below, would upset the balance and prejudice that public interest.

The decision below also puts the Copyright Act into direct conflict with a key element of the F.C.C.'s regulatory scheme. Whereas the F.C.C.'s "carriage rule" requires a CATV system to carry, upon request, the signal of a station within whose B contour it is located, the decision below would make the system liable for copyright infringement if it obeys the regulation and performs such carriage. Thus one federal law would impose liability for doing what another federal law requires.

It is no answer to say that the F.C.C. may revise its rules, if the copyright question is settled in respondent's favor, to require the station to obtain the consent of the copyright owner before requesting carriage by the CATV system. The copyright owner would either charge the station for that right—thereby subverting the F.C.C. policy in favor of aiding such stations by a free carriage requirement—or would authorize the station to request carriage but reserve the right to assert infringement liability against the CATV system itself—thereby restoring the result whereby the CATV system incurs liability under one law for doing what another law requires. The Commission said in the *Second Report and Order* that the public interest in promoting "maximum television service to all the people of the United States" under the Communications Act (¶ 47), requires that a CATV system carry all stations within whose B contour it is located. The copyright owner should not be granted the right to assert his private interests over that public interest, and to force the F.C.C. to revise its carriage rules in order to avoid the conflict.

The obvious solution to the serious conflict between the decision below and the copyright, antitrust and communications policies applicable to this case is to uphold the principle of statutory interpretation announced by this Court in *White-Smith* and to construe the word performance in its "ordinary sense."

IV.

THE COPYRIGHT ACT AND COMMUNICATIONS ACT COMPEL RECOGNITION OF A LICENSE IMPLIED IN LAW FOR SIMULTANEOUS OFF-THE-AIR RECEPTION BY THE PUBLIC OF A TELEVISION BROADCAST AUTHORIZED BY THE COPYRIGHT PROPRIETOR.

In *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), the radio station's broadcast of the copyrighted song had not been authorized by the copyright owner. This Court in its opinion accordingly noted that it had "no occasion to determine . . . the effect upon others of his [the broadcaster's] paying a license fee" (283 U.S. at 198), and in a footnote the Court said:

> "If the copyrighted composition had been broadcast by Duncan with plaintiffs' consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied." *Id.* at 199, n. 5.[86]

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[86] For this suggestion the Court cited *Buck* v. *Debaum*, 40 F.2d 734 (S.D. Calif. 1929), where the broadcast had been licensed. The district court there made the alternative holding that a cafe owner who played the broadcast song to his patrons was protected from infringement liability by a license implied in law:

> "The owner of a copyrighted musical composition can fully protect himself against any unauthorized invasion of his property right by refusing to license the broadcasting station to perform his musical composition; but when he expressly licenses and consents to a radio broadcast of his copyrighted composition, he must be held to have acquiesced in the utilization of all forces of nature that are resultant from the licensed broadcast of his copyrighted musical composition. 40 F.2d at 736.

This question of a license implied in law for simultaneous off the air reception by the public of an authorized broadcast, which the Court left open in *Jewell-LaSalle,* is squarely presented to the Court for the first time in this case.[87] The court of appeals decided the question by ruling that the operations of petitioner's CATV systems in assisting public reception of the telecasts authorized by respondent were not protected by a license implied in law—that there was "no reason to deny plaintiff the right to limit its licenses to viewers who can receive the broadcasts through normal rooftop antennas."[88]

Recognition of a license implied in law for public reception (and for aiding public reception) of an authorized broadcast is compelled, petitioner submits, by the primary policy of the Copyright Act and the policy of the Communications Act, and is confirmed by the economic realities of the broadcasting industry.

A. License Implied in Law Under the Copyright Act

The primary copyright policy, as discussed above (pp. 58-62 *supra*), is to make available to the public the benefits of authors' works; the reward to the copyright owner is a "secondary consideration" justified only by its contribution to the primary objective. See *Mazer* v. *Stein,* 347 U.S. 201, 219 (1954); *United States*

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[87] The court of appeals recognized that "The record on this appeal squarely presents the question whether such a license should be implied in law," and properly characterized the issue as "one of appellate first impression." A 1358, 1360.

[88] With respect to the court's assumption that not one of petitioner's subscribers could have satisfactorily received any one of the five stations by a "normal rooftop antenna," see pp. 84-90 *infra.*

v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); and other authorities cited at p. 59 *supra*.

In a long line of cases decided under the copyright and patent statutes,[89] this Court has recognized a classic situation in which the primary policy prevails over the secondary policy. This is the case in which the statutory monopolist, in return for a license-fee "reward," has released to the public a particular embodient of his patented invention or copyrighted work. In such a situation, so far as that particular embodiment of the work is concerned, the secondary aim of rewarding the monopolist in order to induce him to release his work to the public has been satisfied, and the primary policy applies to confer on the public an "implied license" to use and enjoy that embodiment of the work without having to pay a second royalty to the monopolist. So it has been held in cases where a patentee authorized the sale of a patented article, *e.g.*, *Adams* v. *Burke*, 84 U.S. (17 Wall.) 453, 456 (1873), and where a copyright proprietor authorized the sale of a copy of a copyrighted book. *E.g.*, *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339 (1908).[90] The most recent decision of this Court up-

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[89] "Certainly the rights of the copyright owner are not greater than those of the patentee." *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 143 (1948).

[90] It is true that this Court in its *Jewell-LaSalle* opinion stated that the analogy based on the *Bobbs-Merrill* case was "inapplicable" to the situation presented in *Jewell-LaSalle*. 283 U.S. at 197 (quoted by the court of appeals here at A 1362). The situation there was decisively different from the one presented here, however, in that the broadcast there had not been authorized by the copyright owner. The Court recognized this by stating that it had "no occasion to determine" the effect of the broadcaster's "paying a license fee" (283 U.S. at 198) and by expressly leaving open the question of an implied license to receive an authorized broadcast (*id.* at 199, n. 5).

holding a license implied in law on such a basis was the second *Aro* case, *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476, 493-500 (1964).[91]

As was suggested by this Court in *Jewell-LaSalle* and held by the district court in *Buck* v. *Debaum*, the case of a radio or television broadcast authorized by the copyright proprietor is another situation where this principle applies. When respondent licensed each of the five television stations to broadcast the copyrighted motion pictures, respondent released for reception by the public that broadcast—which in this case is the particular embodiment of the copyrighted work released to the public.[92] Respondent in its agreement with the broadcasting station negotiated a price satisfactory to it for releasing that broadcast for reception by the public. Hence respondent's release of the broadcast must be held to have exhausted the monopoly so far as reception of that broadcast was concerned. And the public must accordingly be held to have a license implied in law to receive that broadcast off the air for private viewing by the use of receiving equipment of its own choice—including reception aided by

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[91] The Court there said:

> "When the patentee has sold the patented article or authorized its sale and has thus granted to the purchaser an 'implied license to use', it is clear that he cannot thereafter restrict that use; 'so far as the use of it was concerned, the patentee had received his consideration, and it was no longer within the monopoly of the patent'." 377 U.S. at 497.

[92] The legally decisive nature of the release to the public is underlined by the free and public character of the radio spectrum and by the policy of the Federal Communications Act (see pp. 79-82 *infra*), which specifies that "broadcasting" is the dissemination of radio communications "intended to be received by the public." 47 U.S.C. § 153(o).

a CATV system such as petitioner's—without being subject to restrictions imposed by, or to the payment of a second royalty demanded by, the copyright owner for that reception.[93]

The implied license belonging to the public under the rule of those decisions is, of course, a license implied *in law*. It vindicates the public's right to receive and enjoy the particular embodiment of the copyrighted work released to it—in this case, the broadcast—regardless of any clauses inserted in the license agreement by the copyright owner purporting to restrict that right. The court below apparently recognized that at least some members of the public had a legal right to receive the broadcast released to the public by respondent, but it cut out of whole cloth, both factually and legally, the notion that respondent nevertheless could "limit its licenses to viewers who can receive the broadcasts through normal rooftop antennas."[94] A 1363. Comparable license clauses purporting to restrict

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[93] Just as this Court held in the two *Aro* cases that "One royalty to one patentee for one sale is enough . . . ," *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U.S. 336, 360 (1961) (Black, J., concurring), so here, one royalty to one copyright owner for one broadcast is enough. (The quoted statement from Mr. Justice Black's concurring opinion in the first *Aro* case states the holding of the Court in Part II of its opinion in the second *Aro* case, 377 U.S. at 493-500.)

[94] In fact, respondent has purported to limit its licenses to viewers who *do* receive the broadcasts through "normal rooftop antennas"—that is, who do not subscribe to CATV—regardless of whether they "can" receive by rooftop antennas. Respondent has also purported to limit some licenses to the Grade A contour of the station, regardless of how viewers outside that area received the broadcasts. See note 79 *supra*. The court below ignored these aspects of respondent's contracts. (With respect to the court's assumption that none of petitioner's subscribers "can receive" any of the stations by rooftop antennas, see note 111 *infra*.)

the public's use and enjoyment of the thing released to it were struck down by this Court in the second *Aro* case, 377 U.S. at 496-97. See also *Bobbs-Merrill Co.* v *Straus*, 210 U.S. 339, 351 (1908).[95]

It is also clear that the public's implied license to receive the authorized broadcasts off the air without paying a second royalty to a copyright owner such as respondent must protect petitioner, whose CATV service is chosen by members of the public as their preferred means of enjoying their right to receive. If petitioner's subscribers have such a right—and respondent has stipulated that their reception of the broadcasts does not make them guilty of infringement (see p. 5 *supra*)—they may not be compelled to "do it yourself"; they must be free to enlist the services of persons such as petitioner, if they so desire, without thereby incurring or imposing infringement liability. Such was the holding of this Court as to a private-businessman defendant in the second *Aro* case, 377 U.S. at 495, 498, 500; see Note, *CATV and Copyright Liability, supra* note 19, at 1520.[96]

Respondent tries to argue that the infringement liability would impose a charge merely on the CATV system, not on the viewer. As a practical matter, copy-

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[95] For patent cases striking down *territorial* restrictions comparable to those asserted by respondent here and expressly sanctioned by the court below (see pp. 64-65 *supra*), see, *e.g.*, *Adams* v. *Burke*, 84 U.S. (17 Wall.) 453 (1873); *Keeler* v. *Standard Folding Bed Co.*, 157 U.S. 659, 664, 666 (1895); *cf. United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967); *Brulotte* v. *Thys Co.*, 379 U.S. 29, 1964).

[96] Under the ruling of the court below, petitioner's subscribers could indeed be liable for contributory infringement by virtue of their contracting for and inducing the "infringing" service of the CATV system. See note 39 *supra*.

right charges imposed on the CATV system would be costs which must ultimately be passed on to the subscribers. In reality the subscribing members of the public would bear the cost of the second license fee that respondent is demanding from the CATV system for the broadcast.[97]

The reasons given by the court below for rejecting the implied license are inadequate. The court distinguished on narrow grounds the long line of implied-license decisions by this Court, refused to consider whether the policy they reflect might be applicable to this case, and relied on a statement from *Jewell-LaSalle* despite this Court's express reservation of the license issue as one clearly not raised by the facts of that case. A 1361-62; see note 90 *supra*. The court below deemed this case to present the "very different issue" of "the divisibility of the copyright holder's exclusive right to perform," which it proceeded to decide with the *ipse dixit* that the copyright holder's "substantial freedom" to limit his licenses "would seem self evident." A 1362. In support of this, the court offered only the puzzling argument that "plaintiff could clearly have limited its licenses to the licensee stations' viewers if those stations had been cable television systems." A 1363.[98] Finally, the court simply refused to consider the policy against double royalties

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[97] See Note, *CATV and Copyright Liability*, *supra* note 19, at 1526. These same subscribers have shared in the payment of the first fee, since the public pays for television programs indirectly by buying the products and services of advertisers.

[98] Besides being apparently another attempt to rely on the fallacious broadcaster analogy (see pp. 43-52 *supra*), the argument ignores the fact that, if petitioner's CATV systems somehow *were* in the position of the "licensee stations" vis-a-vis respondent, they would be originators of the program and there would be no question of respondent's demanding a second reward for a public broadcast for which respondent has already collected once.

embodied in this Court's decisions, stating that it involves "purely legislative considerations." A 1363.[99]

B. The Public's Right Under the Communications Act To Receive Broadcasts.

The license implied in law is grounded not only in the Copyright Act but in the policy of the Federal Communications Act as well.[100] It is clear that CATV presents not simply an issue under the Copyright Act, but an important concern for the national communications policy embodied in the Communications Act.[101] As was recently stated by Professor Benjamin Kaplan:[102]

> "In a deeper view the copyright question is seen as but one phase of the problem of the place of CATV systems in national communications. . . ." [103]

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[99] The court asserted that "the same problem of 'double payment' seems to be presented by any periodical which derives most of its revenues from advertising, but also charges for copies of the periodical, and allows special rates to certain classes of readers." A 1364. But this example does not involve payment of two copyright royalties, and does not invoke the policy of the Copyright Act at all.

[100] The policy of the Communications Act is of course also relevant—as are all the policy considerations applicable to the implied-license issue—to the issue of whether the operations of CATV systems such as petitioner's constitute a "performance" of copyrighted works in the first place. See pp. 58-72 *supra*.

[101] The conflict between the decision below and the F.C.C.'s rules governing CATV is discussed at pp. 67-72 *supra*.

[102] Kaplan, p. 58 *supra*, at p. 105.

[103] In testimony before a Senate Subcommitte with respect to the copyright revision bill and the applicability of copyright restrictions to CATV, the Register of Copyrights has stated:

> "It is the only major issue that is inextricably bound up with policy questions in the communications field; these are questions of national importance that can affect the course of radio and television communications in this country for years to come. And of the principal disputed issues in revision it is by all odds the most complex." *Hearings pursuant to S. Res. 201 on S. 1006, supra* note 77, at 10.

The "declared purposes of the Federal Communications Act," referred to by Professor Kaplan (*supra* p. 58), were stated by Senator Dill in introducing the Radio Act of 1927:

> "First, and most important of all, radio in the United States is free. It is so free to the listener-in that anybody anywhere may listen in to any broadcasting whatsoever . . . ." 67 Cong. Rec. 12335 (1926).

The same policy was carried over into the Act of 1934,[104] as to which this Court has declared that "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 217 (1943). The principle guaranteeing free public reception of licensed broadcasts is embodied, for example, in the Act's definition of "broadcasting" as "the dissemination of radio communications intended to be received by the public." 47 U.S.C. § 153(o) (1964). The meaning of this provision, as has been recently noted, is "that the homeowner has the right to receive any material which is broadcast over the public airways." Note, *CATV and Copyright Liability, supra* note 19 at 1520 (1967).

When Congress desired to make an exception to the Act's policy of free public access to broadcasts, it did so in explicit, limited fashion. Section 325(a) of the Act prohibits the "rebroadcasting" of the signals of a broadcasting station without the station's consent. 47 U.S.C. § 325 (a) (1964). It is clearly established that this section does not apply to CATV operations, since

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[104] See 78 Cong. Rec. 10969, 10987-88 (1934).

CATV is not a broadcaster and does not "rebroadcast." See authorities cited at note 47 *supra*.[105]

Apart from § 325(a) it is the policy of the Federal Communications Act that broadcasts licensed under that Act are intended for the free reception of the public.[106] This policy has been implemented by the

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[105] In 1959 the F.C.C. was of the opinion that § 325(a) should be amended to apply to CATV operations. *Report and Order on Impact*, etc., *supra* note 47, ¶67; *Hearings on VHF Booster and Community Antenna Legislation before Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess., 3-4, 14 (1959). That proposal would have had the same practical effect as the decision below, since an originating station would have had to obtain the permission of the copyright owner before granting consent for CATV reception of its broadcast. The F.C.C.'s proposed amendment was rejected by Congress; the provision for extending § 325(a) to CATV did not survive in the bill that reached the Senate floor (S. 2653, 86th Cong., 2d Sess.), and an attempt to restore it was withdrawn by its sponsor (Senator Allott) after floor debate. 106 Cong. Rec. 10528-30 (1960).

The F.C.C. no longer advocates extension of § 325(a) to CATV, describing itself as "not in a position to state whether a § 325(a) approach would be effective and fully consistent with the public interest." *Second Report and Order*, ¶153(iii). The Commission has instead instituted its comprehensive regulatory scheme for CATV. See pp. 67-71 *supra*.

[106] Respondent in the court below attempted to paint a frightening picture of disruption in the television industry if the public was held to have a license in law to receive public broadcasts. Respondent conjured up microwave relay of a big-city station's signals from one end of the country to the other, and so forth. Of course, no microwave was involved in this case—only off-the-air reception within and near the B contours of the stations. If it is to be determined that microwave relays or other specific practices in the television industry are undesirable from the viewpoint of communications policy, the proper body to make such a determination, and to impose restrictions tailored to the perceived evils, is the F.C.C. or Congress. The F.C.C. has in fact adopted microwave regulations (which are not at issue in *United States* v. *Southwestern Cable Co.*, No. 363, this Term) which now control the use of microwaves by CATV. 47 C.F.R. §§ 21.710-.714, 74.1001-.1083, 91.557-.561.

financing of television through commercial advertising —a method which distributes the cost of television viewing indirectly through the populace, and rejects the imposition on the public of direct charges for the right to receive ordinary television broadcasts. This policy, petitioner submits, is offended by the decision of the court below.

Free public reception is denied by a rule allowing the copyright owner to restrict, and impose a toll on, the reception of a station's broadcast by certain members of the public who choose to receive it by subscribing to a CATV system such as petitioner's. The Communications Act would prohibit the station itself from imposing such a restriction on the public's reception of its broadcast.[107] The result is equally inconsistent with the Act when attempted by a copyright owner. Once a copyright owner has licensed a television station to perform his copyrighted work in public through a broadcast, the owner must accept the nature of the broadcasting medium as governed by the Communications Act. See *Buck* v. *Debaum,* 40 F.2d 734, 736 (S.D. Calif. 1929), quoted at note 86 *supra.* The rule announced by the court below, which permits the copyright owner to restrict reception by the public and to impose a copyright toll on some members of the public for the right to receive broadcast television programs

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[107] Efforts to carve out an audience smaller than the whole community capable of receiving a broadcast have been forbidden by the F.C.C. from the first as inconsistent with the duty of a licensed station to broadcast to the public. *E.g., Scroggin & Co. Bank,* 1 F.C.C. 194 (1934). See *Functional Music, Inc.* v. *F.C.C.,* 274 F. 2d 543, 548-50 (D.C. Cir. 1958), *cert. denied,* 361 U.S. 813 (1959) (dictum); *cf. Richard C. Simonton, d/b/a Telemusic Co.,* F.C.C. Release No. 59-1032 (Oct. 12, 1959), 19 Pike & Fischer R.R. 35 (1959).

that their neighbors receive without charge, is not only unreasonably discriminatory but contrary to the policy of the Communications Act.[108]

Nor is that the only respect in which the decision below contravenes the policy of the Communications Act. The power given the copyright owner to restrict his broadcasting licenses in terms of "defined periods and areas or audiences," which the court below expressly approved (A 1362), offends not only the policies of the Copyright Act and the antitrust laws but also the authority given the F.C.C. by the Communications Act "to establish areas or zones to be served by any station." 47 U.S.C. § 303(h) (1964). This authority, which the Commission has relied on as one of the bases for its regulation of CATV,[109] would be supplanted, under the decision below, by control through restrictions in copyright licenses. Copyright owners would be permitted to erect their own "areas or zones to be served" by stations, and to enforce them through infringement suits against those who "contribute" to the "result" of reception by the public. And those members of the public in rural areas, small communities or elsewhere who are dependent on something more than a "normal rooftop antenna"[110] for good television reception will be deprived of those "maximum benefits" which it was the "avowed aim" of the Communi-

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[108] See the testimony of the Antitrust Division of the Department of Justice in *Hearings Pursuant to S. Res. 201 on S. 1006*, *supra* note 77, at 214; Note, *CATV and Copyright Liability*, *supra* note 19, at 1525-26.

[109] *Memorandum Opinion and Order on Community Antenna Television*, 6 F.C.C. 2d 309, 8 Pike & Fischer R.R. 2d 1677, ¶12

[110] See discussion, pp. 84-90 *infra*.

cations Act to secure for them. *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 217 (1943).

The policies of the Copyright Act and the Communications Act, as they apply to the subject of this case, are thus closely related. The objective of the Communications Act is the widest dissemination of broadcast service possible; the primary objective of the Copyright Act is to provide the public with the benefit of the artist's work. Both policies compel recognition of the public's right to receive through a CATV system such as petitioner's (without payment of a second royalty to the copyright owner) a broadcast from a station licensed under the Communications Act and authorized to make the broadcast by the copyright owner. They also require the conclusion that the public has a license implied in law to receive broadcasts off the air and to secure the assistance of third parties in order to exercise effectively their right to receive.

C. The Attempt of the Court Below To Limit the License in Law to Reception With a "Normal Antenna."

Unwilling to deny completely the existence of a public right to receive authorized broadcasts, the court below placed an express limitation on its holding that petitioner's CATV systems are liable for copyright infringement. The court stated (A 1366):

> "A different case might be presented, which we do not decide, if a CATV system's subscribers could receive one or more of the stations carried satisfactorily by normal antennas, as it might then be contended that a copyright holder licensing a broadcast of a work over such a station must be held to have licensed their viewing of the work."

So far as this case was concerned, however, the court found that "no such viewers"—*i.e.*, no "viewers who can receive the broadcasts through normal rooftop antennas"—"were shown to be among defendant's subscribers." A 1363, 1365, nn. 13 and 14. In view of the court's *caveat* quoted above, its holding of infringement is necessarily conditioned on this finding.[11]

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[11] The finding—a new one by the court of appeals, on a question not addressed by the district court—is clearly erroneous.

The court of appeals recognized that the district court had made no finding on this question—suddenly deemed critical by the court of appeals—of what petitioner's subscribers "could have received" from the five stations if they had used "rooftop antennas" instead of subscribing to defendant's system. A 1365, n.14. The district court had made a finding—without indicating its relevance—that "No credible competent evidence was adduced which demonstrated that the residents of Clarksburg or Fairmont, other than the subscribers to defendant's systems, could receive a usable and reasonably satisfactory picture from any of the five television stations in Pittsburgh, Wheeling or Steubenville." A 35-36. On appeal, petitioner challenged this finding, and the court of appeals recognized that such "credible competent evidence" had indeed been adduced —in the form, for example, of undisputed testimony by petitioner's expert that some 10 to 15% of the locations in and around Fairmont, and 1 to 5% in Clarksburg, would be expected to receive satisfactory reception from the five stations without subscribing to the CATV system. A 1365, n.14 (the testimony is at A 911-913). Rather than acknowledging the district court's finding to be clearly erroneous, however, the court of appeals cut out of the district court's cloth a new finding, on which it proceeded to base its denial of an implied-in-law license in this case. The court below stated that the district court's finding "was made as to all the residents of Clarksburg and Fairmont," and that "at least as to defendant's subscribers, we do not find it clearly erroneous" (*ibid*), thereby manufacturing the new finding that *none of defendant's subscribers* could have received satisfactorily from any of the five stations by using a "rooftop antenna." In support of this finding, the court said only that "there was no testimony that any

The new standard which the court below has *sua sponte* fashioned, and suggested (without deciding) as the test of CATV liability for copyright infringement, doubtless was motivated by the desire of the court to delineate a service area of a television station within which a license in law to receive the broadcasts would be implied. The standard the court invented, however, is unsatisfactory because of its extreme ambiguity and its lack of relation to the economics and structure of the industry. The court did not consider, for example, *how many*, or *what percentage*, of a "CATV system's subscribers" would have to be able to receive a particu-

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of defendant's subscribers could have done the same"—*i.e.*, could have done what defendant's expert said 10 to 15% of the locations in Fairmont and 1 to 5% in Clarksburg could do—and that "defendant has apparently never contended that they could." *Ibid.* (For the latter assertion the court cited A 1253, which does not support the assertion.)

The court's new finding, on which its decision in this case depends, cannot stand. The undisputed testimony of petitioner's expert—to the effect that the specified percentages of the locations in Fairmont and Clarksburg could expect satisfactory reception of the five stations—cannot be limited, as the court of appeals arbitrarily assumed, by the assumption that none of these locations housed a subscriber to one of petitioner's systems. The expert was testifying about locations in Clarksburg and Fairmont in general (A 911-13), not about nonsubscribers to petitioner's systems. Of the many favorably situated locations to which he referred, there is no basis for assuming that none of them subscribed. Moreover, the expert's testimony was that the specified percentages of the locations could satisfactorily receive *all five* of the stations. Out of the much greater number of locations capable of receiving *at least one* of the stations, the court's finding means that *not one person* subscribed to petitioner's system in order to receive them all. The record provides no basis for any such unlikely assumption. Thus petitioner submits that the court's finding that none of petitioner's subscribers could receive any of the stations with a rooftop antenna —on which finding the decision below is based—is not only clearly erroneous on this record, but incredible on its face.

lar station by a "normal antenna" in order for the "different case" to be presented in which a copyright holder licensing a broadcast over that station might be held to have licensed "their" viewing of the work.[112] The court left open such questions as whether a system is to be held for infringement on some sort of *pro tanto* basis depending on the percentage of its subscribers who are not shown to be capable of receiving each station by a "normal antenna."[113]

Since the court's suggested standard is framed in terms of the license implied in law, it presumably places on the CATV system the burden of showing that the required number of its subscribers "could receive." See A 1363, n.13; 1365, n.14. The system would thus have the burden of producing affirmative proof, on a house-to-house basis, as to the reception capability of its variously situated subscribers. Moreover, since the court referred to reception of "one or more of the stations carried," and said nothing to indicate that

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[112] What follows if it is shown that some of the subscribers, or even a single one, could have received the station satisfactorily? Is there some magic number of subscribers that will do the trick?

[113] What kind of a device is it that the court refers to sometimes as a "normal antenna" (A 1366) and sometimes as a "normal rooftop antenna" (A 1363) or "rooftop antenna" (A 1365, n.14)? There are no F.C.C. regulations governing receiving antennas or specifying a "normal" or any other variety of antenna for use by the public. There are all kinds of antennas ranging greatly in price, type, and effectiveness. There are all-channel antennas, single-yagi antennas, stacked yagis, antennas with rotor devices to orient them in the direction of the desired signal, antennas with pre-amplifiers, with converters to change UHF to VHF channels, antennas on short masts, tall masts, rooftops, etc. Will the standard of "normality" change as new and better antennas are developed, so that a CATV system which is infringing today may not be tomorrow?

reception of one station authorizes reception of all, the proof would have to differentiate the reception capabilities of the various subscribers with respect to each of the stations carried on the system. Since few if any of the subscribers will have rooftop antennas on their homes, and since not many more will have recently *tried* to receive by erecting a rooftop antenna, the subscribers generally will not know whether they "could receive" any of the stations—and if so, which ones—with such an antenna.[114]

The burden of proof on a CATV system under the court's test would be so heavy, so expensive, and so riddled with uncertainties as to make it doubtful that the license to receive could ever in practice be established.

The court of appeals' test of reception capability could not be met by a CATV system—or an apartment-house "master antenna" system—operating within the same city or town as the station whose signal it carries. In cities such as New York, for example—where three CATV systems have been franchised, and where there are, of course, numerous "master antenna" systems—obstruction from tall buildings frequently makes reception of local stations unsatis-

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[114] The problems of offering specific proof of reception by rooftop antennas are shown by the testimony of respondent's witness Hill, a television repairman and dealer in Fairmont who had installed antennas for home reception in the early 1950's during the early days of petitioner's CATV system. Records were no longer available and he could not remember specific locations where antennas were installed. R 2423-29, 2438-40, 2444-47, 2452-58, 2467-72. These antennas were installed prior to the time that there was a station in Clarksburg or Weston. A 1286-89.

factory, especially for residents of lower-floor apartments.[115]

Even if the court's standard were workable, it would be inconsistent with the policies of the Copyright and Communications Acts. Under both statutes, members of the public who (in the court's words) could not receive the licensed broadcasters' signals satisfactorily by normal antennas, owing to the physical situation of their homes, are nevertheless just as entitled to receive those signals as are their more fortunate neighbors. They, too, are beneficiaries of the public's implied license to receive. The principle espoused by the court below that the copyright holder can impose a second royalty for *their* reception—that respondent can "limit its licenses to viewers who can receive the broadcasts through normal rooftop antennas" (A 1363)[116]—is not

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[115] The Chairman of the F.C.C., Rosel H. Hyde, has testified to a Congressional Subcommittee as follows:

> "There are instances where the local station cannot provide a good signal to all portions of its normal service area because of terrain factors or man-made structures. This is true in New York City and some other metropolitan areas, within the very community where the TV transmitters are located. CATV helps remedy these situations by providing good reception of the local signal throughout the station's prescribed coverage area." *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 77, at 79.

The court did not indicate what a "normal antenna" might be in the case of an apartment. Presumably it must mean the antenna on the television set or at the window of the apartment. It could not mean the master antenna operated by the landlord on the apartment house roof, since that is not the property of the tenant or on his premises, and since under the doctrine of "performance" propounded by the court below the master antenna system is precisely like a CATV system in being itself an infringing "performer." See pp. 53-55 *supra*.

[116] In fact respondent's licenses purport to go further than this. See note 79 *supra*.

only without factual basis in the record of this case, but is without justification in law.[117]

D. The Economic Realities With Respect to the Service Areas of Television Stations.

Petitioner submits that the Copyright Act and the Communications Act confer on the public as a matter of law the right to receive an authorized broadcast off the air, and that nothing in the law limits the right of the public to use whatever means it chooses, or whatever assistance it desires, in obtaining such reception. The court below recognized that such a right must exist, but proposed to limit it by a "normal antenna" test which is unjustified in law or in the facts of this case, and which in practice would make the right almost impossible to establish. If any limit were to be recognized, we submit that it would be more appropriate, and certainly more in accord with the realities of the television industry, to determine whether the CATV system and its subscribers are within the area where service by the broadcasting station was intended and anticipated as shown by the economic structure of the industry. In the present case such an inquiry demonstrates—as petitioner offered to prove—that petitioner's CATV systems were indeed within the economic service areas of the five broadcasting stations.

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[117] Unlike the court of appeals, respondent has consistently taken the position that there is no license in law for CATV systems to aid public reception even with respect to members of the public who unquestionably "could receive" the broadcasts without subscribing to the system. Respondent's claim has been that

> "It makes no difference . . . whether or not the people in Fairmont and Clarksburg can or cannot receive the signals from these five stations because . . . it is immaterial and irrelevant as to what the defendant is doing." A 1342; see also R 3195 ("irrelevant as a matter of law"); R 5177 ("wholly irrelevant").

Economically, from the point of view of both the advertiser who bought time and the copyright owner who licensed a broadcast, the service areas of the five stations included petitioner's CATV subscribers in and around Clarksburg and Fairmont. Petitioner offered to prove that respondent had in fact been paid by the broadcasting stations for the simultaneous reception of the broadcasts by the very members of the public who subscribed to petitioner's systems.[118] The court below properly recognized that since the district

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[118] In connection with its offer of proof, petitioner would have offered standard television-industry reference works, such as Television Factbook, published by Television Digest, Inc., in support of the inclusion of petitioner's CATV subscribers in the contemplated audiences of the five television stations here involved. (Respondent stipulated that it had subscribed to this publication since 1958. A 220.)

For example, Edition No. 33 of the Factbook, covering the period 1962-63 (the relevant pages of which appear at R 4293-96), published a map showing the Grade A and Grade B contours of each station and also showing, in shaded areas, the counties within the station's coverage. The book also shows the number of "TV homes" as computed by the ARB rating service; counties are listed by categories denoting three different degrees of "circulation" by the station: over 50% of the TV homes, between 25% and 50%, and under 25%. The information given in the volume for the five stations, with respect to viewers located in Harrison and Marion Counties, West Virginia (including Clarksburg and Fairmont, respectively), was as follows: For KDKA and WTAE in Pittsburgh and WTRF in Wheeling, Harrison and Marion Counties were included within the station's coverage area in the highest category of coverage, denoting that the station's circulation there was more than 50% of the TV homes. Pp. 520, 524, 675. For WSTV in Steubenville, Harrison County was in the over-50% category and Marion County in the 25-50% category. P. 470. And for WIIC in Pittsburgh, both counties were in the 25-50% category. P. 522. For each of the five stations, the total numbers of "TV homes" in each of the two counties were added to those of all the other counties covered by the station to produce a total figure of homes reached by the station.

court had rejected the offer of proof (A 1327), the facts asserted must be assumed to be accurate for purposes of appellate review. A 1360.[119]

Petitioner offered to prove, for example (see pp. 15-16 *supra*), that the "rating services" which measure television audiences have included in the audiences of the stations in Pittsburgh, Wheeling, and Steubenville the members of the public in and around Clarksburg and Fairmont, including the subscribers to petitioner's CATV systems, and that the stations were aware of

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[119] The court suggested, however, that the accuracy of the facts offered to be proved "seems debatable, at least so far as the royalties were based on revenues from local advertisers who might well have had little or no interest in reaching Clarksburg and Fairmont viewers . . . or even from national advertisers who wished to advertise in Clarksburg through other stations or media." A 1360-61. In this dictum the court failed to note that in one-half the situations in this case the CATV systems were within the B contours—the normal expected reception areas—of the stations. See p. 14 and note 16 *supra;* pp. 94-100 *infra.* Advertisers would routinely expect to pay for coverage within this area whether or not they wanted it.

It is instructive to note in this connection the testimony of the Deputy General Counsel of the Columbia Broadcasting System before the Senate subcommittee considering copyright revision. He supported "an exemption from copyright infringement for retransmissions of television broadcasts to subscribers within the normal coverage area of the television station initiating such broadcasts," and explained as follows:

> "The rationale for this proposal is that a copyright owner who licenses his work for television broadcast by a particular station can reasonably expect his work to be seen by all persons who live within the normal coverage area of that station. In this fact situation the copyright owner can be fully compensated by the royalties he receives for his licensing of broadcasting rights whether the audience sees the performance of his work on a television set connected to a conventional antenna, or on a television set which can receive a CATV system's retransmission." *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 77, at 220.

this fact and advertised their circulation in these communities. A 1321-23. Petitioner offered further to prove that the station's time charges were related to the size of the station's television audience, so that both the advertising charges by the stations and the royalties paid to respondent by the stations took into account the fact that members of the public who would view the telecasts included those residing in and around Clarksburg and Fairmont (including petitioner's subscribers).[120] Thus, petitioner would have shown that respondent had not only received its reward for releasing the broadcasts to the public in general, but had been compensated for the broadcast "intended to be received by" the members of the public who subscribe to petitioner's CATV systems —from whom respondent is hence, clearly, demanding a *second* royalty.

The precise boundary of the service area of a station cannot be drawn without access to the facts relevant to that station's operation. But it is more realistic to look to the economic facts to see who was the intended public for which the broadcast was made and

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[120] Petitioner would have proved that respondent, in advertising the number of homes viewing some of its motion pictures (*viz:* its "Popeye" cartoons), had utilized the ARB rating service's totals of homes viewing those cartoons telecast by the Pittsburgh and Wheeling stations to which respondent had licensed them, and that these totals included homes in and around Clarksburg and Fairmont subscribing to petitioner's CATV systems. A 1322-23. Petitioner would also have shown that respondent entered into contracts with one of these very stations (the Wheeling station) wherein its royalty was measured by the station's income from time sales to advertisers for advertisements telecast in conjunction with respondent's films (A 1324), and that this station advised respondent in 1959 that the fees paid to respondent were based on, and higher because of, coverage secured by the station through CATV reception. R 4292.

for which the copyright owner was paid than to speculate on the ambiguities of reception by a "normal" antenna. The economic realities mark the service area in fact. CATV subscribers (as is true of petitioner's subscribers in this case) are included in the station audiences for whom the specific release of the copyrighted work was intended; the broadcast license fees paid to the copyright owners, therefore, cover the release to those subscribers.[121]

V.

ASSUMING ARGUENDO THAT THE GENERAL PUBLIC DOES NOT HAVE A LICENSE IN LAW TO RECEIVE AUTHORIZED BROADCASTS, THE POLICIES OF THE COPYRIGHT AND COMMUNICATIONS ACT COMPEL THE CONCLUSION THAT THE PUBLIC LOCATED WITHIN THE PRESCRIBED SERVICE AREA OF A BROADCASTING STATION HAS SUCH A LICENSE TO RECEIVE THE STATION BY THE AID OF A CATV SYSTEM.

As discussed above (pp. 12-14 *supra*), the normal service area of a broadcasting station is measured by the F.C.C. and by industry custom, pursuant to regulations of the F.C.C. (47 C.F.R. § 73.684), in terms of a "Grade A contour" and "Grade B contour." The B contour marks the boundary along which reception of "a quality acceptable to the median observer" is expected to be available at least 90 percent of the time

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[121] For references to advertisements and other data showing the general industry practice of counting CATV subscribers among the audience of a television station for purposes of advertising rates and copyright royalties, see *Hearings on Copyright Law Revision Before Subcomm. No. 3 of the House Commm. on the Judiciary*, 89th Cong., 1st Sess., ser. 8, pt. 2, at 1281-82, 1284-85, 1302-06 (1965); *Hearings on Regulation of Community Antenna Television Before the House Commerce Comm.*, 89th Cong. 2d Sess., ser. 89-34, at 659-60 (1966); Note, *CATV and Copyright Liability, supra* note 19, at 1522, 1523 n.52.

at the best 50 percent of the receiver locations.[122] While recognizing that actual service may vary from the prediction, the Commission has recognized and em-

[122] *Sixth Report and Order, supra* note 13, ¶ 97. Acceptable reception of course does not end abruptly at the B contour, but beyond that line diminishes gradually. *Id.* ¶ 94.

The Grade B contour is a conservative description of a television station's service area. The criteria and methods for calculating the distance to the Grade B contour from the station's transmitting antenna were made on a specified reference assumption as to the power of the transmitter, antenna height, and antenna transmission characteristics, soil conductivity and terrain conditions (Id. ¶ 97 and n.5; 47 C.F.R. §§ 73.684, 73.699), and also with respect to "a typical home receiver installation such as the sensitivity of the receiver, the type of antenna, the installation of the antenna and the transmission line used" (*Sixth Report and Order* ¶ 101). In the original regulations the standards for the referenee receiving antenna were conservative and the standards for the sensitivity of the television set have not been changed to take into account improvements since 1951.

With respect to the television receiving set, the Commission assumed a receiver noise level (ratio of desired to undesired signal) typical of receivers in the early days of television, *Third Notice of Further Proposed Rulemaking, Television Broadcast Service,* 16 Fed. Reg. 3072, App. B, pt. II (1951) later approved and adopted in the *Sixth Report and Order* ¶¶ 97-98. Television set performance has substantially improved in the 17 years since issuance of the *Third Notice.*

The reference receiving antenna for engineering calculations was, as a "safety factor", assumed to be a nondirectional half-wave dipole receiving antenna instead of a directional antenna with higher gain (*Sixth Report and Order,* ¶ 95; *Third Notice, supra,* App. B, n. 4 and 8), notwithstanding the ready availability to the public of antennas of higher gain (A 880-81 and 910); and similarly it was assumed that the receiving antennas would be mounted on a 30-foot mast (*Sixth Report and Order* ¶ 92, and App. B, Figures 1-3; 47 C.F.R. ¶ 73.699, Figures 9 and 10) although homeowners could readily provide higher masts to improve their reception. See A 880.

If improvements in antennas and sets were to be taken into account, the number of predicted locations to which the Grade B field intensity could be realized would be higher than as predicted under the Commissioner's rules and accordingly the predicted service area of the station extended. *Cf. Sixth Report and Order* ¶ 101.

ployed the B contour as the rule-of-thumb measure of a station's normal coverage area both generally and in the specific context of CATV.[123] The F.C.C.'s comprehensive regulatory scheme for CATV requires that a CATV system carry upon request, subject to certain priorities and exceptions, the signal of any station "within whose Grade B contour the system is located.". Almost all CATV systems receive one or more stations within whose Grade B contour the system is located.

In the present case, as stated by the court of appeals, "Fairmont is within or on the B contour of four of the stations in suit, and Clarksburg is within the B contour of one." [124] Thus, in one half of the ten system-contour situations presented, petitioner's CATV system and its subscribers are within or on the B[2] contour of the broadcasting station.[125]

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[123] See *Second Report and Order* ¶ 66. As early as 1962, the Commission was utilizing the B contour as a measure of a station's market area in the context of CATV. See *In re Carter Mountain Transmission Corp.*, 32 F.C.C. 459, 462-63, 22 Pike & Fischer R.R. 193, 194c (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963), *cert. den.* 375 U.S. 951 (1963). And the requirement of carriage of stations within whose B contour the CATV system was located was formally imposed on all microwave-served CATV systems in its *First Report and Order on Microwave-Served CATV*, *supra*, page 68, ¶¶ 85-92 (1965). The B contour measure of a station's service area and carriage requirement were reconfirmed in a general reconsideration of the Commission's CATV rules. *Memorandum Opinion and Order*, *supra* note 109, (1967). See also 47 C.F.R. 73.636(a)(1) ("duopoly" rule).

[124] A 1364. See pp. 14-15 *supra*.

[125] In none of the other five system-contour situations is the distance from Clarksburg or Fairmont to the B contour of the station substantial. Especially close are Fairmont to WIIC in Pittsburgh (Ex. H2, E405), and Clarksburg to WSTV in Steubenville (Ex. E2, E394) and to WTAE in Pittsburgh (Ex. I2, E409).

Petitioner submits that, when a CATV system thus operates within the B contour of the broadcasting station whose signal it receives and makes available to its subscribers, it is especially clear that the operations of the system must be held to be protected from copyright-infringement liability by a license implied in law under the Copyright Act and the Communications Act. For in such a case the system's subscribers are members not only of the general public but—assuming *arguendo* that the public may be divided up for this purpose—of the specific public to which the copyright owner, in fulfillment of the primary purpose of the Copyright Act, released the broadcast by licensing the station.[126] And they are also members of that specific public by whom—on the same *arguendo* assumption—the broadcast was "intended to be received" (free of charge) pursuant to the policy of the Communications Act.

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[126] As was pointed out by the Chairman of the F.C.C. in testimony with respect to copyright revision legislation:

> "I particularly mentioned the circumstances where a community antenna would serve entirely as a community antenna service, simply improving the delivery of the signal within the normal service area of the station. In such an area, the station would have purchased copyright privileges, and the improvement in its delivery would not seem to justify the addition of another charge. . . .
>
> ". . . . Well, actually what our regulations do is require that the local CATV system perform the function of a CATV system and carry the local station's signals. Actually in requiring the CATV system to carry the local station's signals, we are simply requiring of them that they perform an antenna service, not a distribution service. We do not believe in these circumstances that an additional copyright payment would be required." *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 77, at 80.

The court below recognized that "it might be urged that courts should employ the B contour as an approximate measure of the range of normal reception," but rejected the idea on the basis that "the contours are mere theoretical estimates calculated without regard to actual terrain or interference," and on the basis of the court's own finding that there was no evidence that "any of defendant's subscribers" could have received "one or more of the stations carried satisfactorily by normal antennas." A 1365 n. 14, 1366.[127] If a court applying the Copyright Act were to adopt any standard as "an approximate measure of the range of normal reception"—for the purpose of limiting the public's implied license for CATV reception—it seems obvious that the standard should not be of the kind devised by the court below. The court's standard, based on whether the CATV system's subscribers "could receive" any of the stations by a "normal antenna," is not only vague and unworkable (see pp. 84-90 *supra*), but it would be dependent on the particular evidence in each case (indeed, on a house-to-house canvass) and would place on the CATV system an insupportable burden of affirmatively proving a hypothetical proposition.

Clearly, it would be better to choose as a standard the B contour, which is officially prescribed, widely recognized, and employed throughout the industry as the measure of a station's normal range. The B contour of every station in the country is already determined and readily available; maps showing the contours of each station are in the public file at the

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[127] The court's finding as to the inability of petitioner's subscribers to receive by normal antennas is discussed at note 111 *supra*.

F.C.C., and are widely published and utilized in the industry.

The accepted and useful nature of the B contour—and also the general acceptance of the proposition that CATV carriage of a station's signal within its B contour should not be restricted—are seen in the F.C.C.'s statement in issuing its comprehensive CATV rules that, under these rules, "with possibly only the rarest exception, CATV activity which does not involve extension of a signal beyond its Grade B contour may freely continue." *Second Report and Order* ¶ 151.[128] Criticism of the F.C.C.'s utilization of the B contour for its carriage rule, on the ground that reception under actual conditions may vary from the predicted

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[128] The B contour as the normal service area where copyright liability would not apply was proposed by the House Judiciary Committee in its proposed Revision of the Copyright Act. With reference to § 111 of the bill (later removed from the bill for other reasons), the Committee report stated:

> "A key concept of section 111 is stated in subsection (a) (3): that a secondary transmission [CATV] is exempt if it is 'made for reception solely within the limits of the area normally encompassed by the primary transmission.' Under the definition added by the committee to section 101, the 'area normally encompassed' by a transmission is the 'entire geographic area within the radius that the transmitter's signal is expected to reach effectively under normal conditions, including any parts of the area within that radius that its signal fails to reach effectively because of terrain, structures, or other physical or technical barriers.' As envisioned by the committee, a transmission's normal area at the present time would generally be the equivalent of its 'grade B contour' as defined in the regulations of the Federal Communications Commission. The definition in section 101 specifically empowers the Register of Copyrights to issue regulations that would 'further particularize this definition, taking into account any pertinent definition in a Federal statute or regulation.'" *H. R. Rep. No.* 2237, 89th Cong. 2d Sess., at 83 (1966).

contour (similar to the ground relied on by the court below), was summarily rejected by the F.C.C. in its general reconsideration of the CATV rules in early 1967. The Commission stated that "examination of the question of actual signal strength in the community or actual contours is necessarily minute and often futile, as it is very difficult to make a valid showing through measurements over a sufficiently wide area and a long enough period of time." *Memorandum Opinion and Order, supra* at note 109, at ¶ 12 n. 6. The Commission expressed the view that "we regard this [B] contour as generally delineating the area within which service from the station can reasonably be expected." [129] *Id.*, at ¶ 32.

Petitioner submits that it is unnecessary for this Court to adopt any standard as the measure of the normal range of reception of a television station. The Court should rule that the operations of petitioner's CATV systems do not constitute a "performance in public" of respondent's motion pictures, or that in any event the policies of the Copyright and Communications Acts require recognition of a license implied in law for public reception of authorized broadcasts. However, if it should be deemed necessary to fashion a limitation to be placed on the scope of that license, petitioner submits that there should be no restriction on reception off the air; and in any event the minimum area for the public's right to receive is the B contour.

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[129] In its brief filed in *Midwest Video Corp.* v. *F.C.C.*, Case No. 18,348 (8th Cir., filed Mar. 9, 1966), an appeal pending before the Eighth Circuit, involving the jurisdiction of the F.C.C. to regulate CATV, the Commission stated with regard to the requirement of carriage of stations in the B contour (at p. 8 n. 7): "In general, it is fair to say that within the grade B contour a good picture is received . . . ."

CONCLUSION

The reasons why imposition of copyright liability on CATV is unjustified in law and policy were forcefully stated by the Department of Justice, when it said:

> "[W]e believe that this copyright proposal [for "blanket copyright liability" of CATV] may have harmful anticompetitive consequences. Moreover, we do not believe that it is compelled by any important interest underlying the copyright law. Finally, we believe that the problems with which it attempts to deal may be better handled through flexible regulation by the FCC uninhibited by a blanket copyright liability." *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 77, at 215.

The judgment of the court below should be reversed.

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